No. 03-107 Status: ARGUED
Title: United States, Petitioner
v.
Billy Jo Lara
Docketed: July 22, 2003
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (01-3695)
Decision Date: March 24, 2003

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jun 12 2003	Application (02A1059) to extend the time to file a petition for a writ of certiorari from June 22, 2003 to July 22, 2003, submitted to Justice Thomas.
Jun 13 2003	Application (02A1059) granted by Justice Thomas extending the time to file until July 22, 2003.
Jul 22 2003	Petition for writ of certiorari filed. (Response due August 21, 2003)
Aug 21 2003	Brief of respondent Billy Jo Lara in opposition filed.
Aug 21 2003	Motion for leave to proceed in forma pauperis filed by respondent Billy Jo Lara.
Sep 3 2003	DISTRIBUTED for Conference of September 29, 2003.
Sep 10 2003	Reply of petitioner United States filed. (Distributed)
Sep 30 2003	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Sep 30 2003	Petition GRANTED.
Sep 30 2003	Motion of respondent Billy Jo Lara for appointment of counsel.
Oct 15 2003	Motion DISTRIBUTED for Conference of October 31, 2003.
Nov 3 2003	Motion to appoint counsel filed by respondent GRANTED. Alexander F. Reichert, Esquire, of Grand Forks, North Dakota is appointed to serve as counsel for the petitioner in this case.
Nov 3 2003	SET FOR ARGUMENT Wednesday, January 21, 2004.
Nov 14 2003	Brief of petitioner United States filed.
Nov 14 2003	Brief amicus curiae of National Congress of American Indians filed.
Nov 14 2003	Brief amici curiae of Washington, et al. filed.
Nov 14 2003	Brief amici curiae of Eighteen American Indian Tribes, Lac Courte Oreilles Tribe, et al. filed.
Nov 14 2003	Brief amici curiae of Idaho, et al. filed.
Nov 18 2003	Record received from the U.S.C.A for the 8th Circuit. (1 envelope)
Nov 21 2003	Motion to dispense with printing the joint appendix filed by petitioner United States.
Nov 24 2003	Record received from the U.S. Dist. Court of North Dakota. (1 folder)
Nov 26 2003	CIRCULATED.
Dec 1 2003	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Dec 15 2003	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Dec 15 2003	Brief amici curiae of Thomas Lee Morris, Elizabeth S. Morris, and Roland J. Morris filed. (Distributed)
Dec 15 2003	Brief amicus curiae of Citizens Equal Rights Foundation filed. (Distributed)
Dec 15 2003	Brief amici curiae of Lewis County, Idaho, Mille Lacs County, MN, and Thurston

	County, Nebraska filed. (Distributed)
Dec 15 2003	Brief of respondent Billy Jo Lara filed. (Distributed)
Dec 19 2003	Motion for leave to participate in oral argument as amici curiae and for divided argument filed by National Congress of American Indians, et al.
Dec 31 2003	Motion to strike portions of the amici curiae brief on behalf of Eighteen American Indian Tribes, Lac Courte Oreilles Tribe, et al. filed by respondent.
Jan 8 2004	Response of amici curiae Eighteen American Indian Tribes, Lac Courte Oreilles Tribe, et al. to respondent's motion to strike portions of amici brief.
Jan 9 2004	Motion of National Congress of American Indians, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
Jan 21 2004	Argued. For petitioner: Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondent: Alexander F. Reichert, Grand Forks, N.D. (Appointed by this Court.)
Jan 26 2004	Motion to strike portions of the amici curiae brief on behalf of Eighteen American Indian Tribes, Lac Courte Oreilles Tribe, et al. DENIED.

Supreme Court, U.S.
FILED

03 107 JUL 22 2003

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY JO LARA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Duro v. Reina*, 495 U.S. 676 (1990), this Court held that Indian Tribes had lost their inherent sovereign power to prosecute members of other Tribes for offenses committed on their reservations. Congress responded to the Court's decision by amending the Indian Civil Rights Act of 1968, 25 U.S.C. 1301, to "recognize[] and affirm[]" the "inherent power" of Tribes to "exercise criminal jurisdiction over all Indians." The question presented is:

Whether Section 1301, as amended, validly restores the Tribes' sovereign power to prosecute members of other Tribes (rather than delegates federal prosecutorial power to the Tribes), such that a federal prosecution following a tribal prosecution for an offense with the same elements is valid under the Double Jeopardy Clause of the Fifth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Reasons for granting the petition	9
A. The court of appeals erred in holding that Congress cannot remove impediments to the exercise of tribal sovereign powers	10
B. The court of appeals erred in rewriting the ICRA amendment as a delegation of federal prosecutorial power	16
C. Two circuits with extensive Indian country are in square conflict on the validity of the ICRA amendment as a restoration of tribal sovereign authority	18
D. The question presented in this case has significant ramifications for law enforcement in Indian country	20
Conclusion	24
Appendix A	1a
Appendix B	23a
Appendix C	35a
Appendix D	44a

TABLE OF AUTHORITIES

Cases:

Abney v. *United States*, 431 U.S. 651 (1977)	6
California v. *Mesa*, 813 F.2d 960 (9th Cir. 1987), aff'd, 489 U.S. 121 (1989)	18
Cherokee Nation v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831)	14
Duro v. *Reina*, 495 U.S. 676 (1990)	2, 3, 4, 7, 9, 12, 14, 15

Cases—Continued: Page

Heath v. *Alabama*, 474 U.S. 82 (1985) 3, 10
Heckler v. *Mathews*, 465 U.S. 728 (1984) 17
Hillside Dairy Inc. v. *Lyons*, 123 S. Ct. 2142 (2003) 16
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982) 15
Milwaukee v. *Illinois*, 451 U.S. 304 (1981) 3
Montana v. *United States*, 450 U.S. 544 (1981) 14, 15
Morton v. *Mancari*, 417 U.S. 535 (1974) 14
Negonsott v. *Samuels*, 507 U.S. 99 (1993) 15
Nevada v. *Hicks*, 533 U.S. 353 (2001) 14, 15
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978) 3, 12, 13-14, 15
Prudential Ins. Co. v. *Benjamin*, 328 U.S. 408 (1946) 16
Rutledge v. *United States*, 517 U.S. 292 (1996) 22
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978) 14
South Dakota v. *Bourland*, 508 U.S. 679 (1993) 15
United States v. *Enas*, 255 F.3d 662 (9th Cir. 2001), cert. denied, 534 U.S. 1115 (2002) (en banc) 2, 9, 18, 20
United States v. *Mazurie*, 419 U.S. 544 (1975) 14, 15
United States v. *Phelps*, 168 F.3d 1048 (8th Cir. 1999) 17
United States v. *Weaselhead*, 156 F.3d 818, reh'g granted and opinion vacated, 165 F.3d 1209 (8th Cir. 1998), cert. denied, 528 U.S. 829 (1999) 6, 18
United States v. *Wheeler*, 435 U.S. 313 (1978) 3, 5, 10, 11, 23

Statutes:

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause) 16
Amend. V (Double Jeopardy Clause) ..... *passim*

Statutes: Page

Act of Nov. 5, 1990, Pub. L. No. 101-511, Title VIII, § 8077, 104 Stat. 1892-1893 (25 U.S.C. 1301(2) and (4)) 4
Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 4
McCarran-Ferguson Act, 15 U.S.C. 1101 *et seq.* 16
18 U.S.C. 111(a) 22
18 U.S.C. 111(a)(1) 5, 6
18 U.S.C. 111(b) 22
18 U.S.C. 113(a) 18
18 U.S.C. 1161 15
18 U.S.C. 1162 21
28 U.S.C. 1291 6
28 U.S.C. 1360 21
Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.* 2
25 U.S.C. 1301(2) 2, 4, 9, 12, 16
25 U.S.C. 1301(4) 4
25 U.S.C. 1302 ..... 2, 17
25 U.S.C. 1302(7) 22
25 U.S.C. 1303 2
Indian Major Crimes Act, 18 U.S.C. 1153 ..... 3, 4, 10-11, 1

Miscellaneous:

H.R. Conf. Rep. No. 261, 102d Cong., 1st Sess. (1991) 13
H.R. Rep. No. 61, 102d Cong., 1st Sess. (1991) 13, 17, 20-21, 22
S. Rep. No. 168, 102d Cong., 1st Sess. (1991) 13, 20, 21

In the Supreme Court of the United States

No. -

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY JO LARA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-22a) is reported at 324 F.3d 635. The vacated panel opinion (App., *infra*, 23a-34a) is reported at 294 F.3d 1004. The opinion of the district court (App., *infra*, 35a-43a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 2003. On June 13, 2003, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 22, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Sections 1301 through 1303 of Title 25 of the United States Code are reproduced at App., *infra*, 44a-46a.

STATEMENT

In *Duro* v. *Reina*, 495 U.S. 676 (1990), this Court held that Indian Tribes no longer possessed the inherent authority to enforce their criminal laws against members of other Tribes. In response to that decision, Congress amended the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301 *et seq.*, to recognize and affirm "the inherent power of Indian tribes * * * to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). This case concerns whether, in light of the amendment, a Tribe acts as a sovereign when it prosecutes members of other Tribes, as the Ninth Circuit held in *United States* v. *Enas*, 255 F.3d 662 (2001) (en banc), cert. denied, 534 U.S. 1115 (2002), or whether a Tribe acts as an instrumentality of the United States,

as the Eighth Circuit held here. The resolution of that question bears on whether a subsequent prosecution by the United States for an offense with the same elements is permissible under the Double Jeopardy Clause of the Fifth Amendment.

1. This Court has held that Indian Tribes have the power, by virtue of their retained inherent sovereignty, to prosecute their own members for violations of tribal law. *United States* v. *Wheeler*, 435 U.S. 313, 323-324 (1978). It follows that, under the "dual sovereignty" principle, the Double Jeopardy Clause permits the prosecution of a tribal member by the United States and by his Tribe for an offense with the same elements. *Ibid.*; *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985) (describing the dual sovereignty doctrine). The Court has also held, however, that the Tribes were divested of their inherent power to prosecute non-Indians upon their submission to the authority of the United States. *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206-212 (1978). In *Duro*, the Court further held that the Tribes were divested of their inherent power to prosecute Indians who are members of other Tribes, sometimes referred to as "nonmember Indians." 495 U.S. at 696; see *id.* at 687-688.

Duro created a potentially significant jurisdictional gap in law enforcement in Indian country. It appeared possible that neither the United States, nor the State, nor the Tribe could exercise jurisdiction if the putative defendant was a member of another Tribe, the offense was not among the major crimes enumerated in the Indian Major Crimes Act, 18 U.S.C. 1153 (or a generally applicable federal crime), and Congress had not authorized the State to exercise such jurisdiction. The *Duro* Court acknowledged that problem, 495 U.S. at 697-698, but reasoned that it was for Congress, "which

has the ultimate authority over Indian affairs," to provide a solution, if needed, *id.* at 698.

Congress quickly closed that jurisdictional gap by amending ICRA to recognize the sovereign power of Tribes to exercise criminal jurisdiction over "all Indians." See Act of Nov. 5, 1990, Pub. L. No. 101-511, Title VIII, § 8077, 104 Stat. 1892-1893 (25 U.S.C. 1301(2) and (4)) (the ICRA amendment); see also Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (permanently enacting the ICRA amendment, which was originally effective only through September 30, 1991). In pertinent part, the amendment expanded ICRA's definition of Tribes' "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). The amendment also defined "Indian" to mean any person who would be subject to federal criminal jurisdiction as an "Indian" for purposes of 18 U.S.C. 1153. 25 U.S.C. 1301(4).

2. Respondent is an enrolled member of the Turtle Mountain Band of Chippewa Indians, which governs a reservation in north-central North Dakota. The events that gave rise to respondent's tribal and federal prosecutions occurred on the Spirit Lake Nation Reservation, which is governed by the Spirit Lake Nation Tribe and which is located in northeastern North Dakota.

On June 13, 2001, police officers of the Bureau of Indian Affairs (BIA) arrested respondent for public intoxication on the Spirit Lake Nation Reservation. When the BIA officers reminded respondent that he was subject to an order excluding him from that reservation, respondent struck one of the officers with his fist. App., *infra*, 2a, 23a.

Respondent pleaded guilty in the Spirit Lake Nation tribal court to three violations of the Spirit Lake Nation tribal code, including violence against a police officer, resisting arrest, and public intoxication. He was sentenced to 90 days' imprisonment for the first of those offenses. See App., *infra*, 36a.

3. On August 29, 2001, respondent was indicted in the United States District Court for the District of North Dakota for assault on a federal officer, in violation of 18 U.S.C. 111(a)(1). The charge involved the same attack on the BIA police officer that was involved in the tribal charge. Respondent consented to proceeding before a magistrate judge. App., *infra*, 35a.

Respondent moved to dismiss the indictment on double jeopardy grounds. The government did not dispute that the tribal assault charge and the federal assault charge involved the same elements, so that successive tribal and federal prosecutions would be permissible under the Double Jeopardy Clause only if they were brought by separate sovereigns. See, *e.g.*, *Wheeler*, 435 U.S. at 316-319 (applying the dual sovereignty doctrine to successive tribal and federal prosecutions of a tribal member).

The magistrate judge rejected respondent's double jeopardy claim that he was being prosecuted twice by the same sovereign. App., *infra*, 37a-40a. The magistrate judge recognized that "the dual sovereignty doctrine applies only when the prosecuting entities derive their prosecutorial powers from independent sources." *Id.* at 37a. The magistrate judge found that requirement to be satisfied in this case, reasoning that the United States and the Tribe each exercises its own sovereign authority in prosecuting a member of another Tribe. See *id.* at 40a The magistrate judge explained that the post-*Duro* ICRA amendment is "a valid recog-

nition of inherent rights of Indian tribes," not a delegation of the United States' own prosecutorial power to the Tribes. *Id.* at 40a (quoting *United States* v. *Weaselhead*, 156 F.3d 818, 823 (8th Cir. 1998), reh'g granted and opinion vacated, 165 F.3d 1209 (8th Cir.) (en banc), cert. denied, 528 U.S. 829 (1999)).

Respondent conditionally pleaded guilty to the violation of 18 U.S.C. 111(a)(1), preserving his double jeopardy claim. He took an interlocutory appeal of the issue before sentencing.[1]

4. A divided panel of the court of appeals affirmed. App., *infra*, 23a-28a.

The panel concluded that the Double Jeopardy Clause did not require the dismissal of the federal prosecution, because the tribal prosecution and the federal prosecution were brought by different sovereigns. App., *infra*, 27a. The panel recognized that this Court's decision in *Duro* held that the Tribes no longer had the inherent sovereign power to prosecute members of

[1] This Court has held that pretrial orders denying motions to dismiss indictments on double jeopardy grounds are "final decisions," within the meaning of 28 U.S.C. 1291, and thus are immediately appealable. *Abney* v. *United States*, 431 U.S. 651, 656-662 (1977). In classifying such orders as within the "small class of cases" that are "beyond the confines of the final-judgment rule," the Court explained that they "constitute a complete, formal, and, in the trial court, final rejection of a criminal defendant's double jeopardy claim," are "collateral to, and separable from, the principal issue at the accused's impending criminal trial," and involve rights that cannot be fully vindicated on an appeal following a final judgment. *Id.* at 659-660. Here, in contrast to the ordinary case in which a defendant takes a collateral order appeal from a pretrial order rejecting a double jeopardy claim, petitioner took an appeal only after jeopardy had attached in the second prosecution. That choice would not appear to affect the finality of the order for purposes of Section 1291.

other Tribes. *Id.* at 25a. The panel reasoned, however, that *Duro* was grounded on federal common law, not on any constitutional limitation on tribal sovereignty. *Id.* at 26a-27a. Accordingly, the panel concluded that Congress could modify the federal common law as reflected in *Duro*, and that Congress did so by enacting the ICRA amendment "recogniz[ing] inherent tribal power." *Id.* at 27a.

Chief Judge Hansen dissented. App., *infra*, 28a-34a. He reasoned that the authority for the tribal prosecution and the federal prosecution derived from a single source—"the legislative authority of the federal Congress exercising, with the President's approval, the power of the United States." *Id.* at 33a-34a. He concluded that "[t]he dual sovereignty limitation on the constitutional protection from double jeopardy is therefore inapplicable." *Id.* at 34a.

5. After granting rehearing en banc, the court of appeals reversed and remanded with directions to dismiss the indictment. App., *infra*, 1a-22a.

a. The court of appeals recognized that respondent's Double Jeopardy Claim turned on whether or not the United States and the Tribe "exercised authority derived from the same ultimate source of power" in prosecuting respondent. App., *infra*, 4a. The court concluded that a Tribe does not exercise its own sovereign power when it prosecutes a member of another Tribe, relying on *Duro*'s holding that, "[i]n the area of criminal enforcement," a Tribe's retained sovereign power "does not extend beyond internal relations among members." *Id.* at 6a (quoting *Duro*, 495 U.S. at 688).

The court of appeals rejected the panel's characterization of *Duro* as "a common law decision that Congress had the power to override via the ICRA amendments."

App., *infra*, 8a. The court instead "conclude[d] that the distinction between a tribe's inherent and delegated powers is of constitutional magnitude and therefore is a matter ultimately entrusted to the Supreme Court." *Ibid.* "Once the federal sovereign divests a tribe of a particular power," the court reasoned, "it is no longer an inherent power and it may only be restored by delegation of Congress's power." *Ibid.*

The court of appeals concluded, however, that it "need not construe the ICRA amendment[] as a legal nullity." App., *infra*, 10a. Giving effect to Congress's perceived intent "to allow tribes to exercise criminal misdemeanor jurisdiction over nonmember Indians," the court interpreted the amendment as delegating federal power to Tribes. *Ibid.* Accordingly, the court held that, because respondent was "necessarily prosecuted pursuant to that delegated [federal] power," the "dual sovereignty doctrine does not apply." *Id.* at 11a.

b. Judge Morris Sheppard Arnold, joined by three other members of the court, dissented. App., *infra*, 11a-22a.

Judge Arnold understood this Court's decision in *Duro* to be based not on the Constitution, but on federal common law. App., *infra*, 11a. He reasoned that the ICRA amendment is a permissible exercise of Congress's "plenary legislative power over federal common law in general and Indian affairs in particular to define the scope of inherent Indian sovereignty." *Ibid.* Accordingly, he concluded that, "[b]ecause the Sprit Lake Nation, in trying [respondent], was simply exercising its own sovereignty, and not a power that Congress delegated to it, [respondent's] double jeopardy rights were not violated." *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals held that Congress cannot authorize Indian Tribes to exercise a sovereign power —the power to prosecute members of other Tribes— that this Court held in *Duro* v. *Reina*, 495 U.S. 676 (1990), that the Tribes had lost. Accordingly, the court interpreted the ICRA amendment, which affirmed "the inherent power of Indian tribes * * * to exercise criminal jurisdiction over all Indians," 25 U.S.C. 1301(2), as a delegation of federal power. As a result, the court determined that, after a Tribe exercises the authority recognized in the ICRA amendment to prosecute a non-member Indian, a federal prosecution of that Indian is barred by the Double Jeopardy Clause of the Fifth Amendment. *Duro*, however, was a federal common law decision, not a constitutional one. Nothing in the Constitution, therefore, prevents Congress from prospectively redefining the scope of tribal sovereignty, as it did in the ICRA amendment, to include the power to prosecute non-member Indians.

The Eighth Circuit's en banc decision in this case squarely conflicts with the Ninth Circuit's en banc decision in *United States* v. *Enas*, 255 F.3d 662 (2001) (en banc), cert. denied, 534 U.S. 1115 (2002), which rejected a similar double jeopardy challenge on the ground that the United States and a Tribe each exercises its own sovereign power when prosecuting a member of another Tribe. And the Eighth Circuit's holding that Tribes conduct such prosecutions only as instrumentalities of the United States undermines effective law enforcement in Indian country. Under that holding, a tribal prosecution, in which only misdemeanor-type punishments may be imposed, would foreclose a subsequent federal prosecution for the same offense or a

greater encompassing offense. Because the question presented in this case is recurring and important,, this Court's review is warranted.

A. The Court Of Appeals Erred In Holding That Congress Cannot Remove Impediments To The Exercise Of Tribal Sovereign Powers

The court of appeals held that this Court's opinions analyzing the scope of the Tribes' retained sovereign powers are constitutional decisions. The court of appeals consequently held that Congress cannot restore, or remove impediments to the exercise of, sovereign powers that this Court has held to have been divested from the Tribes. Contrary to the court of appeals' view, the scope of tribal sovereignty is defined by federal common law as informed by the backdrop of federal treaties and statutes, not by the Constitution, and thus may be modified by Congress in the exercise of its plenary authority over Indian affairs.

1. The Double Jeopardy Clause states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The dual sovereignty doctrine permits successive prosecutions by separate sovereigns for offenses with the same elements, because transgressions against the laws of separate sovereigns do not constitute the "same offence" for purposes of the Double Jeopardy Clause. See *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985) ("When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'").

In *United States* v. *Wheeler*, 435 U.S. 313 (1978), this Court considered whether the United States could prosecute a member of the Navajo Nation for statutory rape, one of the major crimes enumerated in 18 U.S.C.

1153, after he had been prosecuted by the Navajo Nation for the lesser included offense of contributing to the delinquency of a minor. The Court reasoned that the issue turned on the ultimate "source of [a Tribe's] power to punish tribal offenders: Is it a part of inherent tribal sovereignty, or an aspect of the sovereignty of the Federal Government which has been delegated to the tribes by Congress?" 435 U.S. at 322. The Court concluded that, when a Tribe prosecutes a tribal member for a violation of tribal law, "the tribe acts as an independent sovereign, and not as an arm of the Federal Government," *id.* at 329, and thus that the federal prosecution is permissible under the Double Jeopardy Clause.

In considering the scope of the Tribes' inherent sovereignty, the *Wheeler* Court explained that the Tribes, before their incorporation into the United States, possessed "the full attributes of sovereignty," including "the inherent power to prescribe laws for their members and to punish infractions of those laws." 435 U.S. at 322-323. In contrast, the Court said, the sovereignty that Tribes retain today "is of a unique and limited character," existing "only at the sufferance of Congress" and "subject to complete defeasance." *Id.* at 323. The Court added, however, that the Tribes "still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Ibid.* The Court concluded that the Tribes' sovereign power to exercise criminal jurisdiction over their own members had not been extinguished by Congress or surrendered incident to their entering into a dependent relationship with the United States. *Id.* at 323-328.

The Court distinguished the Tribes' criminal jurisdiction over their own members from their criminal

jurisdiction over non-Indians, which was at issue in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978). There, the Court declined to recognize an inherent tribal power to prosecute non-Indians, reasoning that, "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Id.* at 210. The Court concluded that the Tribes could not exercise such power absent a "treaty provision or Act of Congress." *Id.* at 196 n.6.

In *Duro*, the Court considered the unresolved issue at the "intersection" of *Wheeler* and *Oliphant*—namely, whether the Tribes retained the inherent power to prosecute Indians who are members of other Tribes. 495 U.S. at 684. *Duro* held that judicial recognition of such an inherent power would be inconsistent with the Tribes' dependent status, and thus that the Tribes could not exercise that attribute of sovereignty, at least absent some affirmative act by Congress. *Id.* at 684-696.

2. As noted above, Congress enacted the ICRA amendment to restore the criminal jurisdiction that *Duro* found that the Tribes had lost. The text of the amendment embodies Congress's determination to authorize Tribes to act in their own sovereign capacities, not as instrumentalities of the United States, in prosecuting members of other Tribes. The amendment modifies ICRA's definition of tribal "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). Jurisdiction exercised as a "power[] of self-government" necessarily refers to jurisdiction derived

from the Tribes' sovereign authority. And the amendment "recognized" and "affirmed" the existence of that jurisdiction as an "inherent" tribal power, not a federal power.

The legislative history of the ICRA amendment confirms that conclusion. The Senate Report explains that the amendment was intended "to recognize and reaffirm the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians." S. Rep. No. 168, 102d Cong., 1st Sess. 4 (1991). The House Report adds that "this legislation is not a federal delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations." H.R. Rep. No. 61, 102d Cong., 1st Sess. 7 (1991); see H.R. Conf. Rep. No. 261, 102d Cong., 1st Sess. 3 (1991) (the "legislation clarifies and reaffirms the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians on their reservations").

3. The court of appeals held that *Duro* is a constitutional decision and, therefore, cannot be altered by Congress. App., *infra*, 8a. The court was mistaken. *Duro* is properly understood as stating a rule of federal common law, which is "subject to the paramount authority of Congress." *Milwaukee* v. *Illinois*, 451 U.S. 304, 313 (1981).

The Constitution does not address the extent to which the Tribes retain their sovereign powers after their incorporation into the United States. From the early years of this Nation, tribal sovereignty has been understood to be subject to adjustment by federal treaties and statutes; to the extent that Congress has not spoken directly to the issue, tribal sovereignty has been treated as a matter of federal common law. See *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 16-19 (1831) (Marshall, C.J.); see also *Oliphant*, 435 U.S. at

206 (observing that "'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress," which "beyond their actual text form the backdrop for the intricate web of judicially made Indian law"). Thus, in *Duro*, the Court assessed the extent of tribal criminal jurisdiction by reference to non-constitutional sources, including statutes, treaties, and federal court practice. See 495 U.S. at 688-692.

The Court has recognized that Congress may, in the exercise of its "plenary" authority over Indian affairs, *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974), remove restraints that federal common law would otherwise impose on the Tribes' exercise of their sovereign powers. See, *e.g.*, *Nevada* v. *Hicks*, 533 U.S. 353, 359 (2001) ("Where nonmembers are concerned, the 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.'") (quoting *Montana* v. *United States*, 450 U.S. 544, 564 (1981)) (emphasis omitted); *Montana*, 450 U.S. at 562 ("If Congress had wished to extend tribal jurisdiction [over hunting and fishing within the reservation] to lands owned by non-Indians, it could easily have done so by [a statutory revision]."); *United States* v. *Mazurie*, 419 U.S. 544, 556-559 (1975) (Congress may authorize a Tribe to regulate the sale of alcoholic beverages by non-Indians on lands owned by non-Indians within its reservation); cf. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the

powers of local self-government which the tribes otherwise possess.").[2]

So, too, Congress may permissibly remove the constraint that *Duro* recognized to exist, as a matter of federal common law, on Tribes' exercise of their sovereign power to prosecute members of other Tribes. Indeed, *Duro* and *Oliphant* suggest that the scope of tribal criminal jurisdiction as articulated in those cases could be modified by future congressional action. See *Duro*, 495 U.S. at 698 ("If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs."); *Oliphant*, 435 U.S. at 212 (identifying "considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians"); cf. *Negonsott* v. *Samuels*, 507 U.S. 99, 103 (1993) (Congress has "ple-

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[2] This Court's use of the term "delegation" in cases such as *Nevada* v. *Hicks*, 553 U.S. at 359, does not imply that a power exercised by the Tribes as a result of congressional action is a federal power, not a tribal power. Rather, the Court has used the term to encompass action by Congress that restores to a Tribe a sovereign power that was previously divested. See *Montana*, 450 U.S. at 564 (preempted "tribal power * * * cannot survive without express congressional delegation"); accord *South Dakota* v. *Bourland*, 508 U.S. 679, 695 n.15 (1993); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 171 (1982) (Stevens, J. dissenting). In *Mazurie*, the Court sustained an Act of Congress, 18 U.S.C. 1161, that allows the Tribes to regulate non-Indians' liquor sales on reservations. See 419 U.S. at 556-558. In doing so, the Court recognized that the Tribes exercise "independent tribal authority" when they engage in the liquor regulation allowed by Section 1161, whether or not "this independent authority is itself sufficient for the tribes to" engage in such regulation in the absence of congressional action. 419 U.S. at 557.

nary authority to alter" the allocation of criminal jurisdiction in Indian country).

Even if the constraints on the Tribes' exercise of sovereign powers were viewed as deriving from understandings or default rules reflected in the Constitution, it would not necessarily follow, as the court of appeals assumed, that Congress could not authorize an exercise of power that the Tribes would otherwise lack. The Commerce Clause operates as a constraint on the States' inherent sovereign power to regulate commerce within their borders. Yet, Congress may authorize States to exercise that power in a manner that the Commerce Clause would otherwise forbid. See, *e.g.*, *Hillside Dairy Inc.* v. *Lyons*, 123 S. Ct. 2142, 2147 (2003) ("Congress certainly has the power to authorize state regulations that burden or discriminate against interstate commerce."); *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 421-436 (1946) (concluding that the States regained the authority, as a result of the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, to regulate insurance in a manner that could otherwise violate the Commerce Clause).

B. The Court Of Appeals Erred In Rewriting The ICRA Amendment As A Delegation Of Federal Prosecutorial Power

1. Having determined that Congress could not restore the Tribes' sovereign power to prosecute members of other Tribes, the court of appeals construed the ICRA amendment as delegating federal prosecutorial power to the Tribes. App., *infra*, 10a-11a. That ruling cannot be squared with the amendment's text and legislative history.

As discussed above, the ICRA amendment "recognize[s] and affirm[s]" that the Tribes' "powers of self-

government" include "the inherent power * * * to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). That language can be understood only as an attempt to restore that aspect of tribal sovereignty. The House Committee Report confirms that the amendment "is not a federal delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations." H.R. Rep. No. 61, *supra*, at 7. Nor is there any reason to assume that Congress would have countenanced the adverse consequences for Indian country law enforcement that would result from the court of appeals' recharacterization of the amendment. See pp. 22-23, *infra*.

The court of appeals had no authority, in the name of saving the ICRA amendment, to rewrite it in a manner that Congress did not intend. See, *e.g.*, *Heckler* v. *Mathews*, 465 U.S. 728, 741-742 (1984) ("[A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute * * *, or judicially rewriting it.") (citation and internal quotation marks omitted). If, contrary to the government's view, Congress could not restore the tribal sovereign power to prosecute members of other Tribes, the ICRA amendment would have to be invalidated, not recharacterized as a delegation of federal prosecutorial power.

2. If the ICRA amendment were invalid as exceeding Congress's constitutional authority, the Spirit Lake Nation would have lacked criminal jurisdiction over respondent. Jeopardy therefore would not have attached in his tribal prosecution for purposes of the Double Jeopardy Clause. See *United States* v. *Phelps*, 168 F.3d 1048, 1054-1055 (8th Cir. 1999) (rejecting a double jeopardy challenge to a federal prosecution, which followed

a tribal prosecution for an offense with the same elements, because the Tribe lacked criminal jurisdiction over a non-Indian defendant); *California* v. *Mesa*, 813 F.2d 960, 963 n.5 (9th Cir. 1987), aff'd, 489 U.S. 121 (1989). And, if jeopardy did not attach in the tribal prosecution, a federal prosecution would not put respondent twice in jeopardy, and there would be no double jeopardy bar to this federal prosecution.

C. Two Circuits With Extensive Indian Country Are In Square Conflict On The Validity Of The ICRA Amendment As A Restoration Of Tribal Sovereign Authority

The Eighth Circuit's decision in this case squarely conflicts with the Ninth Circuit's decision in *United States* v. *Enas*. See App., *infra*, 8a (court notes its disagreement with *Enas*); *id.* at 22a (Arnold, J., dissenting) (observing that the court's decision is "contrary" to *Enas*); see also *Enas*, 255 F.3d at 673 (noting disagreement with an Eighth Circuit panel decision similar to the decision in this case, see *United States* v. *Weaselhead*, 156 F.3d 818, 823 (1998), reh'g granted and opinion vacated, 165 F.3d 1209 (en banc), cert. denied, 528 U.S. 829 (1999)).

In *Enas*, the defendant, a member of the San Carlos Apache Tribe, had been convicted in the tribal court of the White Mountain Apache Tribe on charges of assault with a deadly weapon and assault with intent to cause serious bodily injury. He was subsequently indicted in federal district court on the same charges under 18 U.S.C. 113(a) and 1153. The district court dismissed the indictment on double jeopardy grounds. The court of appeals, sitting en banc, reversed and remanded for trial. See *Enas*, 255 F.3d at 675.

The Ninth Circuit unanimously held that the dual sovereignty doctrine permits an Indian to be prosecuted successively for an offense with the same elements by the United States and by a Tribe other than his own. Although the majority and the concurrence reached that conclusion by different routes, all members of the en banc court agreed that Congress could respond to *Duro* by defining Tribes' inherent sovereign powers to include the exercise of criminal jurisdiction over reservation crimes committed by non-member Indians. See 255 F.3d at 670 (observing that the majority and the concurring judges "agree that Congress has the authority to identify the parameters of tribal sovereignty").

The majority characterized the ICRA amendment as an attempt by Congress "to replace *Duro*'s historical narrative—according to which the tribes had no power over nonmember Indians—with a different version of history that recognized such power to be 'inherent.'" *Enas*, 255 F.3d at 669. The majority acknowledged that Congress could not do so if *Duro*'s historical understanding of tribal sovereignty rested on the Constitution. *Id.* at 673. The majority reasoned, however, that "*Duro* is not a constitutional decision but rather * * * a decision founded on federal common law," noting that "[n]owhere does *Duro* intimate that it is announcing a constitutional precept, nor does it state that its analysis is compelled or influenced by constitutional principles." *Ibid.* "Consequently," the majority concluded, "Congress had the power to do exactly what it intended when it enacted the 1990 amendments to the ICRA," *i.e.*, "to determine that tribal jurisdiction over nonmember Indians was inherent." *Id.* at 675.

The four concurring judges viewed *Duro* as conclusively determining, as of the time of that decision, the

federal common-law relationship between the United States and the Tribes and the extent to which the Tribes retained an aspect of their sovereignty. See *Enas*, 255 F.3d at 678-679 (Pregerson, J., concurring). The concurrence nonetheless reasoned that Congress could prospectively redefine that relationship, and thus could "add[] to * * * tribal sovereignty by recognizing the tribes' inherent power to prosecute members of other tribes." *Id.* at 680.

The decision in this case cannot be reconciled with *Enas*. In the Ninth Circuit, successive tribal and federal prosecutions of a non-member Indian for an offense with the same elements is permissible; in the Eighth Circuit, they are not. Because the vast majority of the Nation's Indian country lies within the Eighth and Ninth Circuits, together with the Tenth Circuit, there is particular reason for the Court to resolve the conflict in this case without awaiting additional cases from other circuits.

D. The Question Presented In This Case Has Significant Ramifications For Law Enforcement In Indian Country

The question whether the ICRA amendment permissibly restored the Tribes' sovereign authority to prosecute members of other Tribes is of great practical importance. If the ICRA amendment is invalid, or if it is construed as a delegation of federal prosecutorial authority, law enforcement in Indian country will be significantly undermined.

1. As the House and Senate Committee Reports on the ICRA amendment recognized, "the administration of justice in Indian country is better served by allowing tribes to exercise jurisdiction over all criminal misdemeanor cases involving Indians." H. R. Rep. No. 61, *supra*, at 7; accord S. Rep. No. 168, *supra*, at 6. That is so for several reasons.

First, as a matter of existing law, neither the United States nor, in many instances, the State has authority to prosecute minor crimes committed by one Indian against another Indian in Indian country. Absent a change in the law, therefore, many offenses committed by non-member Indians could fall within a "jurisdictional void," unable to be prosecuted by any government. S. Rep. No. 168, *supra*, at 4.

Second, neither the United States nor the State might be able to devote sufficient resources to the prosecution of minor crimes committed by non-member Indians. The Senate Committee Report found that, after *Duro*, "U.S. Attorneys, already overburdened with the prosecution of major crimes, could not assume the caseload of criminal misdemeanors referred from tribal courts for prosecution of nonmember Indians." S. Rep. No. 168, *supra*, at 4. The Committee also found that, even in Public Law 280 States (where States have been granted the authority to prosecute crimes committed by Indians in Indian country, see 18 U.S.C. 1162, 28 U.S.C. 1360), "state law enforcement officers refused to exercise jurisdiction over criminal misdemeanors committed by Indians against Indians on reservation lands." S. Rep. No. 168, *supra*, at 4.

Third, and relatedly, "[m]ost Indian reservations are located far from urban centers, they are geographically isolated and remote, they are separated from state law enforcement centers by significant distances." S. Rep. No. 168, *supra*, at 7. As the House Committee Report observed, prosecuting minor crimes committed by non-member Indians in distant federal or state courts not only would be "impractical and inefficient," but also would reduce the "deterrent effect" and "community

awareness" produced by administering justice "within the community where the offenses were committed." H.R. Rep. No. 61, *supra*, at 3.

2. Other law enforcement concerns would be presented if the ICRA amendment were construed, as the court of appeals construed it, to authorize Tribes to exercise federal prosecutorial authority over members of other Tribes. In that event, whenever a federal offense was committed on a reservation by a non-member Indian, a tribal prosecution for the "same offence," which includes any lesser-included offense, would bar a federal prosecution. See *Rutledge* v. *United States*, 517 U.S. 292, 297 (1996) (Double Jeopardy Clause bars successive prosecutions for lesser-included and greater-encompassing offenses, because they are the "same offence" within the meaning of the Clause). Although there is no limit to the types of offenses that Tribes may prosecute, punishments are limited to one year's imprisonment and a $5000 fine for any offense. 25 U.S.C. 1302(7). Often, therefore, a tribal prosecution, even if successful, could not result in a sentence adequate to vindicate federal interests. Here, for example, the offense of assault on a federal officer, while carrying misdemeanor penalties when it involves "only simple assault," carries a sentence of as much as 20 years' imprisonment if the defendant used a deadly or dangerous weapon or inflicted bodily injury. See 18 U.S.C. 111(a) and (b).

In many instances, a Tribe could be expected to defer prosecuting a non-member Indian until the United States had decided whether to do so. The risk would nonetheless exist that, whether as a result of choice or inadvertence, a tribal prosecution could occur before a decision whether to pursue a federal prosecution had been made. A Tribe may have different law enforcement priorities and objectives than does the United States; for example, a Tribe may perceive that a violation of tribal law is more effectively addressed within the reservation community by measures other than incarceration. If the Eighth Circuit's decision were to stand, a non-member Indian would have a great incentive to seek tribal prosecution, thereby gaining protection from federal prosecution. See *Wheeler*, 435 U.S. at 330-331 (noting incentives that would exist for tribal members to plead guilty to tribal offenses in order to avoid prosecution for federal offenses carrying more severe penalties).

In sum, whether the ICRA amendment validly restored the Tribes' sovereign power to prosecute non-member Indians—and, if not, whether the amendment should be construed as a delegation of federal power—are questions of vital importance for Indian country law enforcement. For that reason, as well, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-3695

UNITED STATES OF AMERICA, APPELLEE

v.

BILLY JO LARA, ALSO KNOWN AS BILLY JOE LARA, APPELLANT

Submitted: Sept. 11, 2002
Filed: Mar. 24, 2003

Before HANSEN, Chief Judge, MCMILLIAN, BOWMAN, WOLLMAN, LOKEN, MORRIS SHEPPARD ARNOLD, MURPHY, BYE, RILEY, MELLOY, and SMITH, Circuit Judges, En Banc.

WOLLMAN, Circuit Judge.

After a Spirit Lake Nation Reservation tribal court convicted him of assaulting a police officer, Billy Jo Lara was indicted by the federal government for assault on a federal officer in violation of 18 U.S.C. § 111(a)(1). Lara moved to dismiss the indictment on double jeopardy and selective prosecution grounds. Following the district court's denial of the motion, Lara entered a conditional plea of guilty to the indictment, reserving his right to appeal the denial of his motion to dismiss. A panel of this court affirmed, holding that because the power of the Spirit Lake Nation derives

from its retained sovereignty and not from Congressionally delegated authority, Lara's conviction on the federal charge did not run afoul of the Double Jeopardy Clause. We granted Lara's petition for rehearing en banc, vacating the panel's opinion and judgment. We now reverse.

I.

While on the Spirit Lake Nation Reservation on June 13, 2001, Lara was arrested for public intoxication by Bureau of Indian Affairs police officers. The officers informed Lara, who is not a member of the Spirit Lake Nation, of an exclusion order prohibiting him from entering the reservation. Upon hearing of the exclusion order, Lara struck one of the officers with his fist. Lara was charged with five violations of Spirit Lake Tribal Code: violence to a policeman, resisting lawful arrest, public intoxication, disobedience to a lawful order of the tribal court, and trespassing. On June 15, Lara pled guilty to the first three charged offenses and was sentenced to a jail term of 155 days. On August 29, a federal grand jury returned an indictment charging Lara with assault on a federal officer in violation of 18 U.S.C. § 111(a)(1). After consenting to proceed before a United States Magistrate Judge, Lara moved to dismiss the indictment on double jeopardy and selective prosecution grounds or, in the alternative, that discovery be allowed on the claim of selective prosecution. As recounted above, the magistrate judge denied the motions, and Lara entered a plea of guilty conditioned on his right to seek appellate review of his motion to dismiss the indictment.

II.

We review *de novo* the denial of a motion to dismiss on double jeopardy grounds. *United States v. Alverez*, 235 F.3d 1086, 1089-90 (8th Cir. 2000). The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The right to be free from multiple prosecutions is limited by the dual sovereignty doctrine, which permits an independent sovereign to prosecute an individual who has been prosecuted by another sovereign for the same act. One who violates the laws of two independent sovereigns commits an offense against each, and thus a second prosecution is not for "the same offence." *Heath v. Alabama*, 474 U.S. 82, 88, 106 S. Ct. 433, 88 L. Ed. 2d 387 (1985).

The application of the dual sovereignty doctrine "turns on whether the two entities draw their authority to punish the offender from distinct sources of power." *Id.* The Double Jeopardy Clause does not permit successive prosecutions under the dual sovereignty doctrine where the authority for the prosecution derives from the same sovereign source. *See, e.g., Waller v. Florida*, 397 U.S. 387, 393-95, 90 S. Ct. 1184, 25 L. Ed. 2d 435 (1970) (a city and its parent state); *Puerto Rico v. Shell Co.*, 302 U.S. 253, 264-66, 58 S. Ct. 167, 82 L. Ed. 235 (1937) (the federal government and a territorial government); *United States v. Mills*, 964 F.2d 1186, 1193 (D.C. Cir. 1992) (en banc) (the federal government and the District of Columbia). Conversely, the dual sovereignty doctrine permits a state to prosecute a defendant who has previously been prosecuted for the same act by another state or the federal government. *Heath*, 474 U.S. at 93, 106 S. Ct. 433 (two states);

Bartkus v. Illinois, 359 U.S. 121, 139, 79 S. Ct. 676, 3 L.Ed.2d 684 (1959) (upholding state prosecution following federal prosecution); *United States v. Williams*, 104 F.3d 213, 216 (8th Cir. 1997) (upholding federal prosecution following state prosecution). Consequently, whether the dual sovereignty doctrine applies to Lara's double jeopardy challenge turns on whether the Spirit Lake Nation exercised sovereign authority emanating from a sovereign source distinct from that of the overriding federal sovereign.

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978), the Supreme Court held that a tribe had no inherent power to prosecute non-Indian residents of its reservation. "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Id.* at 210, 98 S. Ct. 1011. In *United States v. Wheeler*, the defendant raised a double jeopardy challenge to a federal prosecution commenced after Wheeler, an enrolled member of the tribe, had been convicted in tribal court on a lesser included offense. 435 U.S. 313, 315-16, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978). Wheeler argued that because Congress has plenary authority to abrogate tribal sovereignty, the tribe was in effect an arm of the federal government. *Id.* at 319, 98 S. Ct. 1079. The Court explained that its dual sovereignty precedents did not turn on the extent of control one sovereign had over another, but whether the two prosecutions exercised authority derived from the same ultimate source of power. *Id.* at 319-20, 98 S. Ct. 1079. The Court held that among the "unique and limited" sovereign powers retained by the tribe was the power to punish "members of the Tribe for violations of tribal law." *Id.* at 323-24, 98 S. Ct. 1079. The distinction expressly and repeatedly drawn by the Court was not premised on the racial status of the defendant but on his membership status. Although tribes retained authority over their internal affairs, they had been implicitly or explicitly divested of authority over nonmembers. *Id.* at 324-25, 98 S. Ct. 1079. "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." *Id.* at 326, 98 S. Ct. 1079. Because Wheeler was an enrolled member of the tribe, he was prosecuted pursuant to an inherent sovereign power that had never been divested from the tribe, and thus subsequent federal prosecution for the same act was not barred. *Id.* at 332, 98 S. Ct. 1079.

In *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981), the Court again emphasized the distinction between the retained or inherent sovereignty over internal relations between members of the tribe and the sovereignty over external relations that necessarily had been divested from the tribes. "[T]he dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations*." *Id.* at 564, 101 S. Ct. 1245 (quoting *Wheeler*, 435 U.S. at 326, 98 S. Ct. 1079, emphasis added by *Montana* Court). The Court held that the tribe's retained inherent sovereignty did not authorize it to regulate hunting and fishing by nonmembers on reservation land owned in fee by nonmembers. *Id.* at 564-65, 101 S. Ct. 1245.

The question of what power a tribe has over nonmember Indians was addressed in *Duro v. Reina*, 495 U.S. 676, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990). Duro, an enrolled member of a different tribe, was charged in Pima-Maricopa Indian Community Court with unlawful firing of a weapon, a misdemeanor, in connection with the death of an Indian boy. *Id.* at 679-81, 110 S. Ct. 2053. His motion to dismiss for lack of jurisdiction was denied. *Id.* at 681-82, 110 S. Ct. 2053. Because the Salt River Pima-Maricopa Indian Community did not claim that its jurisdiction over Dura stemmed from Congressionally delegated authority, the Court was faced with the question whether the tribe's retained or inherent sovereignty provided it with jurisdiction over a nonmember Indian. The Court held that it did not. *Id.* at 688 ("In the area of criminal enforcement, however, tribal power does not extend beyond internal relations among members.").

In response to the decision in *Duro*, Congress amended the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301, by revising the definition of "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2). The amendment also defined "Indian" to include all Indians subject to federal jurisdiction under the Indian Major Crimes Act, 18 U.S.C. § 1153. 25 U.S.C. § 1301(4). Thus, under the ICRA amendments, Indians who are enrolled members of a federally recognized tribe are subject to the jurisdiction of all tribes.

Although the Supreme Court has not yet construed the post-*Duro* ICRA amendments, it has repeatedly reaffirmed its holdings limiting tribal sovereign author-

ity to tribe members. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001) (rejecting under the *Montana* test the imposition of a hotel occupancy tax on nonmember-owned reservation hotel on non-Indian fee land); *Nevada v. Hicks*, 533 U.S. 353, 358-59, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001) (citing *Oliphant* for the general rule that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe").

> Although Indian tribes retain inherent authority to punish members who violate tribal law, to regulate tribal membership, and to conduct internal tribal relations, *United States v. Wheeler*, 435 U.S. 313, 326, 98 S.Ct. 1079, 55 L. Ed. 2d 303 (1978), the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana*, 450 U.S. at 564, 101 S. Ct. 1245.

South Dakota v. Bourland, 508 U.S. 679, 694-95, 113 S. Ct. 2309, 124 L. Ed. 2d 606 (1993).

In *United States v. Weaselhead*, 156 F.3d 818 (8th Cir. 1998), we construed the ICRA amendments in a double jeopardy case factually similar to the present case. The district court had held that *Duro* and *Oliphant* were federal common law decisions within the ultimate authority of Congress to overrule. 36 F. Supp. 2d 908, 914-15 (D. Neb. 1997). A divided panel of this court reversed, concluding that "ascertainment of first principles regarding the position of Indian tribes within our constitutional structure of government is a matter ultimately entrusted to the Court and thus beyond the

scope of Congress's authority to alter retroactively by legislative fiat." 156 F.3d at 824. On rehearing en banc, the panel opinion was vacated and the district court affirmed by an evenly divided court. 165 F.3d 1209 (8th Cir. 1999).

The Ninth Circuit has held *Duro* to be a common law decision that Congress had the power to override via the ICRA amendments. *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001) (en banc), *cert. denied* 534 U.S. 1115, 122 S. Ct. 925, 151 L. Ed. 2d 888 (2002). Although the *Enas* court conceded that sovereignty has "constitutional implications," *id.* at 673, it concluded that the lack of an express citation to a constitutional provision indicated that *Duro* was a common law decision, an area in which Congress is supreme. *Id.* at 674-75.

With all due respect to the holding in *Enas*, we conclude that the distinction between a tribe's inherent and delegated powers is of constitutional magnitude and therefore is a matter ultimately entrusted to the Supreme Court. Absent a delegation from Congress, a tribe's powers are those "inherent powers of a limited sovereignty which has never been extinguished." *Wheeler*, 435 U.S. at 322, 98 S. Ct. 1079 (quoting F. Cohen, Handbook of Federal Indian Law 122 (1945)) (emphasis omitted). Once the federal sovereign divests a tribe of a particular power, it is no longer an inherent power and it may only be restored by delegation of Congress's power.

Congress's broad authority over Indian affairs derives from and is limited by the Constitution. Some decisions root this power in the Indian Commerce Clause. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 531 n.6, 118 S. Ct. 948, 140 L. Ed. 2d 30 (1998); *McClanahan v. Arizona*, 411 U.S. 164,

172 n.7, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973). Prior to 1903, the federal government negotiated agreements with Indian tribes pursuant to its treaty power, U.S. Const. art. II, § 2, cl. 2, but the combination of an 1871 statute and the development of the plenary power doctrine ended this process. *Antoine v. Washington*, 420 U.S. 194, 201-04, 95 S. Ct. 944, 43 L. Ed. 2d 129 (1975). The Supreme Court has suggested that we must be guided in part by structural principles that are both implicit and explicit in the Constitution. *See Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996); *see also Duro*, 495 U.S. at 684, 110 S. Ct. 2053 ("The question we must answer is whether the sovereignty retained by the tribes in their dependent status within our scheme of government includes the power of criminal jurisdiction over non-members."). Some decisions have found plenary authority in the government's trust responsibility, *Stephens v. Cherokee Nation*, 174 U.S. 445, 478, 19 S. Ct. 722, 43 L. Ed. 1041 (1899), or in the guardian-ward relationship between the federal government and the tribes, *Morton v. Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974), but references to these non-constitutional sources of power have largely been supplanted by a reliance on the commerce power. *See, e.g., Alaska v. Native Village*, 522 U.S. at 531 n.6, 118 S. Ct. 948.

The ICRA amendments are "a legislative enactment purporting to recast history in a manner that alters the Supreme Court's stated understanding of the organizing principles by which the Indian tribes were incorporated into our constitutional system of government." *Weaselhead*, 156 F.3d at 823. In exercising its commerce power, Congress may not "override a constitu-

tional decision by simply rewriting the history upon which it is based." *Enas*, 255 F.3d at 675. *Duro*'s determination of first principles regarding Indian sovereignty within the federal system of government is ultimately one for the Court. The Court reaffirmed this principle subsequent to the ICRA amendments:

> The dissent's complaint that we give "barely a nod" to the Tribe's inherent sovereignty argument is simply another manifestation of its disagreement with *Montana*, which announced "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe[.]" 450 U.S. at 565, 101 S. Ct. 1245. While the dissent refers to our "myopic focus" on the Tribe's prior treaty right to "absolute and undisturbed use and occupation" of the taken area, it shuts both eyes to the reality that after *Montana*, tribal sovereignty over nonmembers "cannot survive without express congressional delegation," 450 U.S. at 564, 101 S. Ct. 1245, and is therefore *not* inherent.

Bourland, 508 U.S. at 695 n.15, 113 S. Ct. 2309 (internal citations omitted). Thus the ICRA amendments cannot have the effect that they plainly sought to achieve: a retroactive legislative reversal of *Duro*. We need not construe the ICRA amendments as a legal nullity, however. It is apparent that Congress wished to allow tribes to exercise criminal misdemeanor jurisdiction over nonmember Indians. *See Hicks*, 533 U.S. at 377 n. 2, 121 S.Ct. 2304 ("In response to our decision in *Duro*, . . . Congress passed a statute expressly granting tribal courts [jurisdiction over nonmember Indians].") (Souter, J., concurring). Nothing in our decision today in any way circumscribes the jurisdiction so conferred.

The Spirit Lake Nation exercises authority over external relations only to the extent that such a power has been delegated to it by Congress. As a nonmember, Lara was necessarily prosecuted pursuant to that delegated power. Because the dual sovereignty doctrine does not apply where the ultimate source of power is the same, the Double Jeopardy Clause bars the government from maintaining a second prosecution for the same act. Accordingly, the motion to dismiss the indictment should have been granted.

The order denying the motion to dismiss on double jeopardy grounds is reversed, and the case is remanded to the district court with directions to dismiss the indictment.

MORRIS SHEPPARD ARNOLD, Circuit Judge, dissenting, in which BOWMAN, MURPHY, and SMITH, Circuit Judges, join.

The essential difficulty that I see with the result that the court reaches today is that the Supreme Court in *Duro v. Reina*, 495 U.S. 676, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990), did not base its decision on the Constitution, nor did the Constitution require the result that the Court reached there. The result in that case was instead based on federal common law, nothing more and nothing less, and in the ICRA amendments Congress exercised its plenary legislative power over federal common law in general and Indian affairs in particular to define the scope of inherent Indian sovereignty. In other words, Congress restored to the tribes a power that they had previously exercised but had lost over the years as a result of Supreme Court decisions. Because the Spirit Lake Nation, in trying Mr. Lara, was simply exercising its own sovereignty, and not a power that

Congress delegated to it, Mr. Lara's double jeopardy rights were not violated.

I.

According to current legal thought, Indian tribes possessed criminal jurisdiction over nonmember Indians as part of their full territorial sovereignty prior to colonization by us or our European predecessors. *See Duro*, 495 U.S. at 685-86, 110 S. Ct. 2053. The Supreme Court held in *Duro*, however, that the Indians had lost this aspect of their sovereignty because of their "dependent" status. *See id.; cf. Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978).

The court opines in the present case that "[o]nce the federal sovereign divests a tribe of a particular power, it is no longer an inherent power and it may only be restored by delegation of Congress's power." This holding draws on statements in Supreme Court opinions that a tribe's inherent sovereignty consists of those aspects of sovereignty that the tribes "retained" despite the federal government's overriding sovereignty. *See, e.g., Duro*, 495 U.S. at 685, 110 S. Ct. 2053. The court's apparent premise is that power cannot be a retained one once the Supreme Court holds that it no longer exists.

This premise, however, fails both as a matter of history and of logic. Historically, it misapprehends the materials that the Supreme Court has used over the years to fashion the relationship between the United States and Indian tribes; logically, it improperly assumes that there is only one way that a power can be retained. In my view, the ICRA amendments did not create a new tribal power out of whole cloth, it merely

relaxed a common-law restriction on a power previously possessed. Regardless of the fact that the ICRA amendments are a "but-for" cause of the Spirit Lake Nation's ability to try Mr. Lara here (which of course they necessarily are), the origin of that power was not the ICRA amendments themselves but the full territorial sovereignty that the tribes possessed in the past. *Cf. Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 421-33, 437-38, 66 S. Ct. 1142, 90 L.Ed. 1342 (1946). Thus, the power at hand is a "retained" one, even if it had been rendered temporarily unavailable by decisions of the United States Supreme Court.

A.

Three cases from the early nineteenth century, all of which Chief Justice Marshall wrote, provided a foundation for federal Indian law: *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543, 5 L.Ed. 681 (1823), *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1, 8 L.Ed. 25 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Peters) 515, 8 L.Ed. 483 (1832). An examination of these cases shows that in forging the legal relationship between Indian tribes and the government of the United States, "the Supreme Court in the Marshall trilogy embraced pre-constitutional notions of the colonial process, rooted in the law of nations, involving both inherent tribal sovereignty and a colonial prerogative vested exclusively in the centralized government." *See* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 Minn. L. Rev. 31, 57 (1996). These principles, which the Supreme Court created from extra-constitutional sources, have "been consistently followed by the courts for more than a hundred years." *See* Felix S. Cohen, *Handbook of Federal Indian Law* 123 (1988); *cf.* Frickey, *supra*, at 58-60.

In *M'Intosh*, 21 U.S. at 573, Chief Justice Ma
justified federal power over Indian tribes in ter
the right of discovery, a euphemism for the rig
conquest, *see* Judith Resnik, *Multiple Sovereig
*Indian Tribes, States, and the Federal Governme
Judicature 118, 119 (1995). That this right was u
sally recognized, he asserted, was "prove[d]" b
history of America from its discovery to the p
day." *M'Intosh*, 21 U.S. at 574. As Judge Canb
explained, "[t]he principles of discovery were, of c
European (and, by adoption, federal) law [a
Marshall's view that was the only kind of law th
Supreme Court could apply." William C. Canb
Federal Indian Law 69 (3d ed. 1998).

Eight years later in *Cherokee Nation*, 30 U.S.
17, Chief Justice Marshall held that Indian tribe
foreign states, but ones with a special relation
the United States, namely, that "of a ward
guardian." In making this determination, the
Justice looked not to the Constitution but
M'Intosh, to the uniform custom of nations a
history of our country's dealings with Indian
See id. at 16-18. The next year in *Worcester*, 31
555, Chief Justice Marshall wrote that the relat
of the Cherokees to the United States "was th
nation claiming and receiving the protection
more powerful: not that of individuals abandonin
national character, and submitting as subjects
laws of a master." He then held that under inter
law the Indian tribes retained the right
government, because

> [t]he very fact of repeated treaties wit
> recognizes it; and the settled doctrine of th
> nations is, that a weaker power does not su

> its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its own safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. *Id.* at 560-61.

At the end of the century, the Court reaffirmed these sentiments in *United States v. Kagama*, 118 U.S. 375, 6 S. Ct. 1109, 30 L.Ed. 228 (1886). A few years before that case, in *Ex Parte Crow Dog*, 109 U.S. 556, 3 S. Ct. 396, 27 L.Ed. 1030 (1883), the Court had held that the murder of an Indian by another Indian in Indian country was within the sole jurisdiction of the tribe, and so federal territorial courts had no power over such a crime. Congress reacted by passing the Indian Major Crimes Act, 18 U.S.C. § 1153, declaring murder and other serious crimes committed by an Indian in Indian country to be federal offenses triable in federal court. In *Kagama*, the Court upheld the constitutionality of the act, despite the fact that the Constitution "is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders," 118 U.S. at 378, 6 S. Ct. 1109, and even though the Court was "not able to see in [any clause] of the constitution and its amendments any delegation of power to enact a code of criminal law for the punishment of [serious crimes]," *id.* at 379, 6 S. Ct. 1109. Rather, the Court concluded, the legitimacy of the act derived from extra-constitutional sources, such as its necessity for the Indians' protection and the fact that the power to pass the act "must exist in th[e federal] government because it never has existed anywhere else; because the theater of its exercise is

within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes." *Id.* at 384-85, 6 S. Ct. 1109.

Unlike *Kagama*, which addressed the question of whether a grant of federal criminal jurisdiction in Indian country was consistent with the federal government's role as "guardian," *Oliphant, United States v. Wheeler*, 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978), and *Duro*, addressed the converse question, that is, whether the retention of certain criminal jurisdiction in Indian country was consistent with the Indian tribe's role as "ward." Despite this difference, all four cases reached their answers in the same way, namely, by reference to governmental custom and practice and to the general principles of the *jus gentium*. What is importantly missing from all of these cases is the slightest intimation that their outcome was dictated by some substantive constitutional principle.

In *Wheeler*, 435 U.S. at 324-26, 98 S. Ct. 1079, for instance, the Court analyzed various statutes establishing federal criminal jurisdiction over crimes involving Indians, and described how these statutes had left in place tribal criminal jurisdiction over members as part of the inherent sovereign power of Indian tribes. In discussing why none of these statutes had divested the Indians of this power, the Court restated the sentiments expressed in *Worcester* that the "'settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection.'" *See Wheeler*, 435 U.S. at 326, 98 S. Ct. 1079 (quoting *Worcester*, 31 U.S. at 560-61). *Wheeler* thus quite clearly decided that tribes retained criminal

jurisdiction over tribal matters as a matter of federal common law.

Although neither *Oliphant* nor *Duro* ever explicitly stated that it was a common-law decision, or referred to the law of nations, these decisions too were founded on federal common law. *See, e.g.*, Canby, *supra*, at 127; Philip P. Frickey, *A Common Law for our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 Yale L. J. 1, 65 (1999); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 Colum. L. Rev. 809, 853 (1996). In both cases, the Court analyzed history and governmental custom and devised from them the principle that, as a result of the dependent status of Indian tribes, tribal criminal enforcement power did not extend beyond internal relations among its members. *See Duro*, 495 U.S. at 685-92, 110 S. Ct. 2053; *Oliphant*, 435 U.S. at 196-210, 98 S.Ct. 1011; *cf. United States v. Enas*, 255 F.3d 662, 668-69 (9th Cir. 2001) (en banc), *cert. denied*, 534 U.S. 1115, 122 S. Ct. 925, 151 L. Ed. 2d 888 (2002).

The Court in *Duro* did say that any power delegated to the tribes would be "subject to the constraints of the Constitution," 495 U.S. at 686, 110 S. Ct. 2053, and that there would be due process concerns in subjecting nonmember Indians to trial in tribal courts because those courts did not provide constitutional protections as a matter of right, *see id.* at 693-94, 110 S. Ct. 2053. But none of this can serve to convert *Duro* into a "constitutional" decision. A decision is "constitutional" only when it states, or necessarily implies, that the Constitution requires the result that it reaches.

In *Duro*, as in all cases, the Court had the obligation and the power under Article III to decide the case

before it and "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). Without any statute stating whether Indian tribes had criminal jurisdiction over nonmember Indians, it acted as a common-law court, using whatever sources were relevant and readily at hand to ascertain the applicable legal principles and to answer the question before it. As with all federal common law, however, Congress has the legislative authority to revise the result in *Duro* in whatever way it desires.

B.

The court holds that *Duro* 's distinction between inherent and delegated powers is of "constitutional magnitude." I take that to be a claim that *Duro* was based on the Constitution and, therefore, that the Court's determination in *Duro* of what constitutes inherent tribal sovereignty is final and binding on Congress. The court, however, never says precisely where in the Constitution principles of Indian sovereignty might actually reside. *Cf. United States v. Weaselhead*, 156 F.3d 818, 825 (8th Cir. 1998) (M.S.Arnold, J., dissenting).

The court does provide two possibilities. First, it refers to "structural principles that are both implicit and explicit in the Constitution," citing *Duro* and *Seminole Tribe*. The court, however, does not describe what these structural principles are, nor does it explain why they derived from the Constitution. In fact, "no court has [ever] found a constitutionally protectible interest in tribal sovereignty itself," Canby, *supra*, at 85; and, "[t]o the extent that Indian tribes are discussed in the Constitution, they seem to be recognized as having a status outside its" perimeters, Judith Resnik,

Dependent Sovereigns: Indian Tribes, States, and the Federal Courts, 56 U. Chi. L. Rev. 671, 691 (1989).

Perhaps the proposition that the court is urging is that since certain attributes of state sovereignty derive from the structure of the Constitution, *see, e.g., Alden v. Maine*, 527 U.S. 706, 724, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999), the perimeters of inherent tribal sovereignty must do so as well. That proposition, however, fails to recognize the fact that "[u]nlike states, which ceded some sovereignty with the passage of the Constitution, Indian tribes did not." Resnik, *Multiple Sovereignties, supra*, at 119. The Indian tribes did not participate in the making of the Constitution, so its structure cannot tell us anything about the extent of their sovereignty. *Cf. Worcester*, 31 U.S. at 555, 559-60; Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881, 949 (1986). Thus, as Chief Justice Marshall noted in *Worcester*, Indian nations, such as the Cherokees in *Worcester*, remained "distinct, independent political communities" even after the adoption of the Constitution. *Worcester*, 31 U.S. at 559-61. The status of Indian tribes in our constitutional order is thus more akin to that of foreign nations than to that of the states.

Second, the court points out that in recent years references to "non-constitutional sources of [Congress's plenary power] have largely been supplanted by a reliance on the [Indian] commerce power." But the fact that the scope of the Indian commerce power has expanded in recent years and is now often seen as the source of legislation that regulates the Indians as dependent communities, *e.g., Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 531 n.6, 118 S. Ct. 948, 140 L. Ed. 2d 30 (1998), does not mean that the

traditional view of the origins of the relationship between Indian tribes and the United States has somehow been submerged. When pressed for a source of Congress's plenary authority, the Court tends increasingly to rely on the Indian commerce clause, I think, simply because in the particular context, it sees no need to look further.

The source of Congress's plenary power is in any case beside the point: Regardless of its source, it is well settled that Congress's power is plenary. It is a non sequitur to intimate that because the source of the plenary power *may* have changed from a "non-constitutional" to a constitutional source, Congress's ability to legislate is somehow circumscribed. If that were true, then Congress's authority would no longer be plenary. *Cf. Lone Wolf v. Hitchcock*, 187 U.S. 553, 565, 23 S. Ct. 216, 47 L.Ed. 299 (1903).

Even if the mere existence of the Indian commerce clause somehow restricted the powers that tribes inherently possess, moreover, inherent tribal sovereignty would still be a matter of federal common law. Consider, as an analogy, dormant commerce clause restrictions on state legislation that unduly burdens interstate commerce. A court can invalidate a state law on dormant commerce clause grounds, but Congress can reverse the court's decision and authorize the state to re-enact the legislation: Dormant commerce clause prohibitions are thus considered federal common law. *See, e.g.*, Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 Ark. L. Rev. 1175, 1175 (2003); *cf.* Frickey, *A Common Law*, *supra*, at 71-72. Thus, no matter how one views the matter, Congress retains legislative authority to determine prospectively what power tribes inherently possess.

C.

The court also relies on *South Dakota v. Bourland*, 508 U.S. 679, 113 S. Ct. 2309, 124 L. Ed. 2d 606 (1993), a case that it notes was decided "subsequent to the ICRA amendments." The Supreme Court in that case did state that the exercise of tribal power beyond what is necessary to control internal relations is not inherent and therefore cannot survive without express congressional delegation, *see id.* at 694-95 & n.15, 113 S. Ct. 2309, and our subsequent case law is replete with similar statements. But, as always, language must be understood in context, and the context in which these statements were made was different in a way that makes the present case legally distinguishable.

Although *Bourland* and some other cases that were decided after the ICRA amendments, *e.g.*, *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001), have addressed inherent and delegated powers, they did not involve the amendments. The question raised here, namely, whether Congress could restore aspects of sovereignty to tribes, rather than delegate power to it, therefore did not arise in those cases and could not have been decided by them. It is only if Congress does not have the power to restore aspects of Indian sovereignty that delegation becomes the only option. In my opinion, the statements in cases such as *Oliphant* and *Duro* that the jurisdiction in question was not inherent and could only be delegated by Congress described what would be true absent the sort of legislation that we have before us. *Cf. Hicks*, 533 U.S. at 377 n.2, 121 S. Ct. 2304 (Souter, J., concurring).

II.

In reaching its conclusion, the court rejects a contrary result by a unanimous eleven-judge court in *Enas*, 255 F.3d 662. Though the rationales in the two opinions in that case differed somewhat, all of the judges agreed that the inherent sovereignty of Indian tribes was a matter of federal common law, not constitutional law. For the reasons that I have tried to explain, that conclusion seems to me to be ineluctable.

The basic question in this case is whether providing tribes with the inherent power to try nonmember Indians for crimes falls within Congress's plenary authority over Indian affairs (which the court agrees that Congress has). In light of the Supreme Court pronouncement that all "aspect[s] of tribal sovereignty . . . [are] subject to plenary federal control and definition," *see Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 891, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986), it seems to me that the only possible answer to that question is that Congress can do what it quite plainly sought to do here.

I therefore respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-3695

UNITED STATES OF AMERICA, APPELLEE

v.

BILLY JO LARA, ALSO KNOWN AS BILLY JOE LARA, APPELLANT

Submitted: June 12, 2002
Filed: June 24, 2002

Rehearing En Banc Granted;
Opinion and Judgment Vacated Aug. 1, 2002.

Before HANSEN, Chief Judge, FAGG and BOWMAN, Circuit Judges.

FAGG, Circuit Judge.

Bureau of Indian Affairs officers arrested Billy Jo Lara on the Spirit Lake Nation Reservation for public intoxication. Lara is an Indian, but not a member of the Spirit Lake Nation. When BIA officers reminded Lara of the order excluding him from the Spirit Lake Nation Reservation, Lara struck an officer with his fist. Lara pleaded guilty in tribal court to three violations of the Spirit Lake tribal code, including violence to a police officer. Later, Lara was charged in federal court with

misdemeanor assault of a federal officer. Lara moved to dismiss the indictment, claiming the federal charges violated the prohibition against Double Jeopardy and impermissible selective prosecution. The district court* denied Lara's motion to dismiss. Lara then entered a conditional guilty plea, reserving the right to appeal the denial of his pretrial motions. Having carefully reviewed de novo the district court's denial of Lara's motion to dismiss the indictment, we affirm. *United States v. Kriens*, 270 F.3d 597, 602 (8th Cir. 2001), *cert. denied*, 535 U.S. 1008, 122 S. Ct. 1586, 152 L. Ed. 2d 504 (2002).

Lara contends the federal prosecution duplicates the tribal conviction, holding him twice responsible for the same criminal conduct in violation of the Double Jeopardy Clause. Under the separate sovereign doctrine, a defendant may be prosecuted by multiple governmental units for the same conduct if the governmental units draw their authority from separate sources of power. *Heath v. Alabama*, 474 U.S. 82, 88, 106 S. Ct. 433, 88 L. Ed. 2d 387 (1985). Lara argues the separate sovereign doctrine does not apply because the Spirit Lake Nation and the federal government draw their power from the same source, the United States Constitution. The government responds the Spirit Lake Nation draws its authority from its retained sovereignty, not from a Congressional delegation of power. According to the Government, the Spirit Lake Nation is a separate sovereign and the successive federal prosecution is permissible. Resolution of Lara's contention, then, depends

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* The Honorable Alice R. Senechal, United States Magistrate Judge for the District of North Dakota, sitting by consent of the parties under 28 U.S.C. § 636(c).

on the Spirit Lake Nation's source of power to prosecute Lara.

The Supreme Court concluded that Indian nations draw their authority to prosecute criminal offenses by tribal members from the Indian nation's retained sovereignty and that tribal courts do not have jurisdiction over nonIndians. *United States v. Wheeler*, 435 U.S. 313, 325-26, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978) (tribes have no jurisdiction over nonIndians). In 1990, the Supreme Court ruled that Indian nations lacked authority to prosecute nonmember Indians for criminal acts. *Duro v. Reina*, 495 U.S. 676, 685, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990). *Duro* concluded by noting that any practical deficiencies in the present jurisdictional scheme should be addressed by Congress, "which has the ultimate authority over Indian affairs." *Id.* at 698, 110 S. Ct. 2053. Immediately after *Duro* issued, Congress amended the Indian Civil Rights Act (ICRA), redefining tribal powers of self-government to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2) (1994). Thus the amended ICRA clarifies that Indian nations have jurisdiction over criminal acts by Indians, whether the Indians are tribal members or nonmembers.

Because the courts are obligated to interpret the Constitution and declare what the law is, it is important to distinguish whether *Duro* was based on constitutional law or federal common law. *Cooper v. Aaron*, 358 U.S. 1, 18, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958). If *Duro* is a constitutional opinion, we must inquire whether Congress had the authority to overrule the Supreme

Court's decision. *Id.; City of Boerne v. Flores*, 521 U.S. 507, 536, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). On the other hand, if *Duro* is based on federal common law, Congress properly clarified its intent by amending the ICRA, and we defer to Congress. *United States v. Enas*, 255 F.3d 662, 675 (9th Cir. 2001) (citing *Morton v. Mancari*, 417 U.S. 535, 551-52, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)), *cert. denied*, 534 U.S. 1115, 122 S. Ct. 925, 151 L. Ed. 2d 888 (2002).

The Supreme Court has not addressed the relationship between *Duro* and the amended ICRA, or addressed the substantive issue of whether Congress is delegating authority under the amended ICRA or is recognizing retained tribal authority. We were presented with these very issues in *United States v. Weaselhead*, 156 F.3d 818, 821 (8th Cir. 1998), *reh'g granted and opinion vacated by*, 165 F.3d 1209 (8th Cir.) (en banc), *cert. denied*, 528 U.S. 829, 120 S. Ct. 82, 145 L. Ed. 2d 70 (1999). In *Weaselhead*, an evenly divided en banc court affirmed the district court's denial of Weaselhead's motion to dismiss the indictment on Double Jeopardy grounds. The district court in *Weaselhead* concluded that Congress recognized retained tribal sovereignty when stating that tribes have criminal jurisdiction over nontribal members. *United States v. Weaselhead*, 36 F. Supp. 2d 908, 914-15 (D. Neb. 1997). Although we are not bound by the evenly divided court's decision, we reach the same result. *See United States v. Grey Bear*, 863 F.2d 572, 573 (8th Cir. 1988) (holding an equally divided en banc opinion decides the case, but has no precedential effect).

Like the district court, we conclude *Duro* grounds its holding in federal common law, not Constitutional law, because *Duro* discusses tribal sovereignty without

reference to the Constitution. *See United States v. Lara*, No. C2-01-58, 2001 WL 1789403, *3 (D.N.D. Nov. 29, 2001); *see also Enas*, 255 F.3d at 673-75; *Weaselhead*, 156 F.3d at 825 (dissent). Having concluded tribal sovereignty is governed by federal common law, we must defer to Congress. *Enas*, 255 F.3d at 673-75. The plain language of the amended ICRA together with the amendment's legislative history convinces us that Congress intended to recognize inherent tribal power, not to expressly delegate Congressional authority. *Weaselhead*, 36 F. Supp. 2d at 912-913 ("Indian tribal-governments have retained the criminal jurisdiction[ ] over non-member Indians and [the amendment] is not a delegation of this jurisdiction but a clarification") (quoting H.R. Conf. Rep. No. 102-261 at 3-4 (1991)). The Spirit Lake Nation, then, draws its power to prosecute Lara from its retained sovereignty. Because tribal authority and federal authority arise from the separate sources of the tribe's inherent power and the federal Constitution, the Double Jeopardy clause is not offended by two separate sovereigns convicting Lara for crimes arising from the same conduct. *See Enas*, 255 F.3d at 675; *United States v. Archambault*, 174 F. Supp. 2d 1009, 1022 (D.S.D. 2001); *Weaselhead*, 36 F. Supp. 2d at 915.

Next, Lara contends the federal Government's decision to prosecute him for misdemeanor assault resulted from impermissible selective prosecution based on race. We disagree. At issue is the United States Attorneys' policy of not prosecuting federal misdemeanors for acts that resulted in earlier state or federal convictions, known as the *Petite* policy. *United States Attorneys' Manual* § 9-2.031 (describing the *Petite* policy regulating successive misdemeanor prosecu-

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v. Armstrong, 517 U.S. 456, 465, 116 S. Ct. 148
Ed. 2d 687 (1996).

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We thus affirm the district court's denial
motion to dismiss the indictment.

HANSEN, Circuit Judge, dissenting.

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I respectfully dissent. In my opinion, Lara
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organizing principles by which Indian tribes were incorporated into our constitutional system of government as recognized in *Duro*, *Wheeler*, and *Oliphant*. Because those principles are not only based on federal common law but are also most firmly grounded in constitutional principles, I would hold that while Congress may certainly delegate new powers to tribes, it may do so only under constitutional constraints. It may not rewrite the history of retained sovereignty under the label of federal common law.

By virtue of their status as the aboriginal people of this continent, Indian tribes retain certain incidents of their preexisting inherent sovereignty. Among these is the right to internal self-government, which "includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions." *Wheeler*, 435 U.S. at 322, 98 S. Ct. 1079. If the power to punish nonmember Indians emanated from a tribe's inherent sovereignty, double jeopardy would not be implicated by a subsequent federal prosecution for the same conduct. If, however, the ultimate source of power authorizing a tribal criminal conviction is "an aspect of the sovereignty of the Federal Government which has been delegated to the tribes by Congress," the Double Jeopardy Clause would bar a subsequent federal prosecution. *Id.*

"The sovereignty that the Indian tribes retain is of a unique and limited character" which "exists only at the sufferance of Congress and is subject to complete defeasance." *Wheeler*, 435 U.S. at 323, 98 S. Ct. 1079. The Court stated in *Wheeler*, that "the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their

dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." *Id.* at 326, 98 S. Ct. 1079. "[T]he dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." *Id.*

The Supreme Court's holding in *Duro*, which states that Indian tribes do not have inherent sovereignty to assert criminal jurisdiction over nonmember Indians, is grounded in constitutional law. In *Duro*, the Court confirmed its earlier statements characterizing the dependent status of tribes and their power of internal self governance, as well as our prior conclusion that, at least in criminal matters, a tribe's inherent sovereign powers extend only to tribe members, irrespective of an individual's racial status as an Indian. 495 U.S. at 686, 110 S. Ct. 2053; *see also, Greywater v. Joshua*, 846 F.2d 486, 493 (8th Cir. 1988) ("We thus conclude that the Tribe's authority to prosecute nonmember Indians is nonexistent."). The Court in *Duro* recognized that when a criminal prosecution reflects a "manifestation of external relations between the Tribe and outsiders," including nonmember Indians, this type of power is necessarily "inconsistent with the Tribe's dependent status, and could only have come to the Tribe by delegation from Congress." 495 U.S. at 686, 110 S. Ct. 2053. Importantly, the Court stated that any such congressional delegation of power is "subject to the constraints of the Constitution." *Id.* The Court explained that "[t]he exercise of criminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe, and involves

a far more direct intrusion on personal liberties." *Id.* at 688, 110 S. Ct. 2053. Because all Indians are also full citizens of the United States, such an intrusion necessarily implicates "constitutional limitations," and we must reject "an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system." *Id.* at 693-94, 110 S. Ct. 2053.

The *Duro* Court further stated:

> Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States. We hesitate to adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them. As full citizens, Indians share in the territorial and political sovereignty of the United States. The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members. Indians like all other citizens share allegiance to the overriding sovereign, the United States. A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority.

495 U.S. at 693, 110 S.Ct. 2053 (internal quotations omitted). Thus, "the sovereignty retained by the tribes in their dependent status within our scheme of government" does not include the power of criminal

jurisdiction over nonmembers, even if they are Indians. *Id.* at 684, 110 S. Ct. 2053.

While the Supreme Court has not yet had occasion to directly construe the post-*Duro* revision of the ICRA, the Court has since affirmed the principle that jurisdiction of an Indian tribe over nonmembers of the tribe, irrespective of race, is not within "[g]eneral principles of 'inherent sovereignty'" and is not possible, absent an affirmative delegation of power from Congress. *See South Dakota v. Bourland*, 508 U.S. 679, 694-95, 113 S. Ct. 2309, 124 L. Ed. 2d 606 (1993). Additionally, a subsequent concurring opinion recognized that since *Duro*, "Congress passed a statute expressly granting tribal courts . . . jurisdiction" over nonmember Indians, and distinguishing *Duro* factually by explaining that "here, we are concerned with the extent of tribes' inherent authority, and not with the jurisdiction statutorily conferred on them by Congress" as in the post-*Duro* amendment context. *Nevada v. Hicks*, 533 U.S. 353, 377 n.2, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001) (Souter, J., concurring).

Prior to the revisions, tribal criminal jurisdiction over nonmember Indians did not exist as it had been "necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States." *Duro*, 495 U.S. at 693, 110 S. Ct. 2053. It is beyond Congress's power to declare that the inherent sovereignty of a tribe has always provided it with criminal authority over nonmember Indians where the Supreme Court has found the facts to be otherwise. It is my opinion that the "ascertainment of first principles regarding the position of Indian tribes within our constitutional structure of government is a matter ultimately entrusted to the Court and is thus beyond

the scope of Congress's authority to alter retroactively by legislative fiat. Fundamental, *ab initio* matters of constitutional history should not be committed to '[s]hifting legislative majorities' free to arbitrarily interpret and reorder the organic law as public sentiment veers in one direction or another." *Weaselhead*, 156 F.3d at 824 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 529, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997)) (alteration in original) (opinion vacated). This conclusion is firmly grounded in constitutional principles which guarantee equal protection to all citizens regardless of race** and also protect personal liberties; it is inextricably linked to the very basis on which our constitutional system was established—that the authority to govern is derived from the consent of the governed. Thus, in spite of Congress's attempt to characterize this grant of authority as a mere recognition of a power that has always existed, the post-*Duro* amendment can be nothing more nor less than an affirmative delegation of jurisdiction from Congress to the tribes, the validity of which is not at issue in this case.

Because the power of the tribe to punish nonmember Indians emanates solely from a congressional delegation of authority, the tribal court and the federal court in which a second conviction is now sought to be secured do not "draw their authority to punish the offender from distinct sources of power" but from the identical source. *Heath*, 474 U.S. at 88, 106 S. Ct. 433.

** The Equal Protection Clause of the Fourteenth Amendment is made applicable to the federal government through the Fifth Amendment's Due Process Clause. *See Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 98 L.Ed. 884 (1954); *United States v. Iron Shell*, 633 F.2d 77, 89 n.17 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001, 101 S. Ct. 1709, 68 L. Ed. 2d 203 (1981).

That single source is the legislative authority of the federal Congress exercising, with the President's approval, the power of the United States as the overriding sovereign under the Constitution. The dual sovereignty limitation on the constitutional protection from double jeopardy is therefore inapplicable, and the Double Jeopardy Clause bars the federal prosecution of Lara for the same conduct that provided the factual basis for his earlier conviction in tribal court.

For these reasons, I would reverse the district court's denial of Lara's motion to dismiss the indictment. I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHEASTERN DIVISION

No. C2-01-58

UNITED STATES OF AMERICA

v.

BILLY JO LARA A/K/A BILLY JOE LARA

Nov. 29, 2001

MEMORANDUM OPINION

SENECHAL, Magistrate J.

This case presents the issue of whether the double jeopardy clause bars federal prosecution subsequent to a tribal prosecution of a nonmember Indian for an offense arising from the same conduct. It is an issue on which there is no binding precedent.

FACTS

Defendant Billy Jo Lara, a/k/a Billy Joe Lara, was charged in an Indictment with a misdemeanor assault of a federal officer under 18 U.S.C. § 111(a)(1). Defendant Lara consented to proceed before a magistrate judge pursuant to 18 U.S.C. § 3401(b).

Defendant Lara filed two motions to dismiss the indictment. One motion asked that the indictment be

dismissed as violative of the double jeopardy clause. The other motion asked that the indictment be dismissed for selective prosecution, or that in the alternative discovery be allowed. Both motions were denied in an Order dated November 1, 2001, which also stated that this memorandum opinion would follow.

After the motions were denied, and with the consent of the government and approval of this Court, Defendant Lara entered a conditional plea of guilty pursuant to Fed. R. Crim. Pro. 11(a)(2). An Order for Release Pending Sentencing, which incorporated an Amended Order Setting Conditions of Release, was filed following the conditional guilty plea.

The charge to which Mr. Lara entered a conditional guilty plea is simple assault against a federal officer. The incident occurred while Mr. Lara was in the custody of Bureau of Indian Affairs officers on the Spirit Lake Nation Reservation. The incident occurred after Mr. Lara was arrested for public intoxication on June 13, 2001, and was transported to the police department. BIA officers told Mr. Lara of an order excluding him, a nonmember of the Spirit Lake Nation, from the Spirit Lake Nation Reservation. After he was told of the exclusion order, Mr. Lara hit BIA Police Officer Byron Swan.

Mr. Lara was charged with violations of the Spirit Lake Tribal Code: violence to a policeman [sic], resisting lawful arrest, trespassing, disobedience to a lawful order of the tribal court, and public intoxication. Two days later, on June 15, 2001, Mr. Lara pled guilty to three of the tribal charges: violence to a police officer, resisting lawful arrest, and public intoxication. On the three charges, he was sentenced to a term of 155 days in jail.

On August 29, 2001, a federal grand jury returned an indictment charging Mr. Lara with assault on a federal officer. He alleges that the indictment violates the double jeopardy clause, because the charge is based on the same conduct as that for which the tribal sentences were imposed.

Double Jeopardy

The double jeopardy clause provides, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The double jeopardy clause must be applied in light of the dual sovereignty doctrine, which provides that successive prosecutions initiated by separate sovereigns do not violate the double jeopardy clause. *See, e.g., United States v. Wheeler*, 435 U.S. 313 (1978); *Koon v. United States*, 518 U.S. 81 (1996).

The dual sovereignty doctrine is based on the principle that a crime is an offense against the sovereignty of a government, and that when a single act violates the sovereignty of two governments, the offender has committed two distinct offenses. *E.g., Heath v. Alabama*, 474 U.S. 82 (1985). If an action violates the laws of two sovereigns, the dual sovereignty doctrine holds that prosecution by both sovereigns does not result in the offender being punished twice for the same offense, but rather that the single action constitutes two offenses, and the offender can be punished for both offenses. *Id.* The dual sovereignty doctrine does not apply if the prosecuting entities are only nominally different; the dual sovereignty doctrine applies only when the prosecuting entities derive their prosecutorial powers from independent sources. *Id.*, 474 U.S. at 90. It must be determined, therefore, whether the Spirit Lake Nation's authority to prosecute Mr. Lara is

derived from the same source as is the federal government's authority to prosecute him.

The premise of defendant's position is that, since he is a nonmember of the Spirit Lake Nation, the tribe had no inherent authority to prosecute him, and that the tribe's only authority to prosecute him arose from a federal statute. If that were true, the tribal prosecution would have arisen from the same source of authority as the federal prosecution, the dual sovereignty doctrine would not apply, and the double jeopardy clause would bar the federal government's prosecution of Mr. Lara. The Court must therefore consider whether the tribe's authority to prosecute Mr. Lara arises from an inherent power or a power delegated by federal statute.

In *Duro v. Reina*, 495 U.S. 676 (1990), the Supreme Court determined that Indian tribes did not have criminal jurisdiction over nonmember Indians. Shortly after the *Duro* decision, Congress amended the Indian Civil Rights Act's definition of tribal "powers of self-government." Before the 1990 amendment, the term was defined to include:

> all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses.

The 1990 amendments changed the definition to include:

> all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; *and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians* (emphasis added).

25 U.S.C. § 1301(2) (2000). Those courts which have found the double jeopardy clause bars a federal prosecution in these circumstances have concluded that the ICRA amendments constitute a delegation of power rather than "simply a non-substantive 'recognition' of inherent rights that Indian tribes have always held ." *United States v. Weaselhead*, 156 F.3d 818, 823 (8th Cir. 1998), *rehearing granted and opinion vacated*, 165 F.3d 1209 (8th Cir.) (*en banc*), *cert. denied*, 528 U.S. 829 (1999).

Mr. Weaselhead, a member of the Blackfoot Tribe, was prosecuted for sexually assaulting a minor on the Winnebago Indian Reservation. Mr. Weaselhead was later indicted by a federal grand jury for the same conduct. The district court denied a motion to dismiss the federal charges, holding that the Winnebago Tribe exercised its inherent sovereignty in prosecuting Mr. Weaselhead, a nonmember Indian, and that the tribe and federal government are two separate sovereigns for purposes of analysis under the double jeopardy clause. *United States v. Weaselhead*, 36 F.Supp. 908 (D. Neb. 1997). A divided panel of the Eighth Circuit reversed the district court's denial of the motion to dismiss. A petition for rehearing was granted, and the Court sitting *en banc* was equally divided, resulting in vacation of the panel opinion and affirmance of the district court opinion. The *en banc* decision has no precedential effect.

The United States District Court for the District of South Dakota recently addressed the same issue presented in *Weaselhead*, and in this case. That Court reached the same conclusion as had the *Weaselhead* trial court, and denied the motion to dismiss on double jeopardy grounds. *United States v. Archambault*, 2001 WL 1297767 (D.S.D. Oct. 18, 2001).

Two district courts in the Eighth Circuit, the *Weaselhead* trial court and the *Archambault* trial court, have determined that Congress had the authority to recognize inherent rights of Indian tribes, because the *Duro* decision is based on federal common law rather than on the Constitution. The Ninth Circuit, *en banc*, reached the same conclusion in *United States v. Enas*, 255 F.2d 662 (9th Cir. 2001).

This Court adopts the reasoning of the *Weaselhead* and *Archambault* trial courts, and of the Ninth Circuit's *Enas* decision. Concluding that the ICRA amendment was a valid recognition of inherent rights of Indian tribes, this Court concludes that authority for the tribal prosecution and the federal prosecution of Mr. Lara are derived from independent sources. The dual sovereignty doctrine therefore applies, and the federal prosecution does not violate the double jeopardy clause.

Selective Prosecution under Petite Policy

Mr. Lara asserts that the government's *Petite* policy results in impermissible selective prosecution based on the race of the defendant. He moved to dismiss the indictment on those grounds, or in the alternative for discovery. The *Petite* policy, based on *Petite v. United States*, 361 U.S. 529 (1960):

> precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s) unless three substantive prerequisites are satisfied; first, the matter must involve a substantial federal interest; second, the prior prosecution must have left that interest demonstrably unvindicated; and third, applying the same test that is applicable to all federal prosecutions, the government must believe that the defendant's conduct constitutes a federal offense, and that admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact.

United States Attorneys' Manual § 9-2.031(A). Approval from the appropriate assistant attorney general is also required. *Id.*

Mr. Lara asserts that, since the *Petite* policy does not apply to prior tribal court prosecutions, and since only Indians can be prosecuted in tribal courts, the *Petite* policy never applies to preclude a second prosecution against an Indian, and therefore discriminates based on race. Mr. Lara cited no case law in support of his position.

The government's response is that the *Petite* policy does not confer substantive rights, but that, if the *Petite* policy were applied, Mr. Lara's prosecution would proceed. At argument, the government referenced other recent prosecutions in this district of non-Indian persons charged with assault against a federal officer.

To succeed on a claim of selective prosecution, one must meet a demanding standard. One claiming selective prosecution must show that the prosecutory policy

had a discriminatory effect and that it w as motivated by a discriminatory purpose. *United St ates v. Armstrong*, 517 U.S. 456, 465 (1996). "To est ablish a discriminatory effect in a race case, the cl aimant must show that similarly situated individuals o of a different race were not prosecuted." *Id.* The standard for allowing discovery to establish a selective e prosecution is also rigorous. A defendant must make a threshold credible showing that persons of other rac es could have been, but were not, prosecuted for the offense with which the defendant is charged. *Id.*, 517 U.S. at 470.

Mr. Lara made no threshold showing th at persons of other races could have been, but were not, charged with assault on a federal officer subsequent to a prosecution by another jurisdiction for the same conduct. He did not satisfy the requirements of *Armstrong* to allow discovery of information to assist in establishing his claim of selective prosecution.

It is well established that the *Petite* policy does not confer substantive rights on a criminal defendant. A challenge to application of the policy cannot establish a claim that a subsequent prosecution constituted selective prosecution barred by the equal protection clause. *United States v. Simpkins*, 953 F.2d 443 (8th Cir.), *cert. denied*, 504 U.S. 928 (1992).

CONCLUSION

An Indian tribe's authority to prosecute a nonmember Indian is derived from the tribe's inherent powers. The federal government's authority for prosecution for the same conduct is derived from federal statute. Since the prosecutorial authority of the tribe and of the federal government are derived from independent sources, the dual sovereignty doctrine

applies. Federal prosecution subsequent to a tribal prosecution of a nonmember Indian for an offense arising from the same conduct is not barred by the double jeopardy clause.

Under the rigorous standards of *United States v. Armstrong*, Mr. Lara failed to establish that his prosecution by the federal government was an impermissible selective prosecution in violation of the equal protection clause, or that he was entitled to discovery to pursue that claim.

APPENDIX D

1. Section 1301 of Title 25 of the United States Code provides:

For purposes of this subchapter, the term—

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self- government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;

(3) "Indian court" means any Indian tribal court or court of Indian offense; and

(4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

2. Section 1302 of Title 25 of the United States Code provides:

No Indian tribe in exercising powers of self-government shall-

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people

peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and* a fine of $5,000, or both;

---

* So in original. Probably should be "or".

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

3. Section 1303 of Title 25 of the United States Code provides:

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

ORIGINAL

(2)

No. 03-107

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY JO LARA, RESPONDENT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Respondent, Billy Jo Lara, by and through his attorney, Alexander F. Reichert, asks leave to file the attached Respondent's Brief in Opposition without prepayment of costs and to proceed *in forma pauperis*. Respondent has been granted leave to so proceed in the United States District Court for the District of North Dakota and United States Court of Appeals for the Eighth Circuit. No affidavit is attached in so much as the U.S. District Court and United States Court of Appeals for the Eighth Circuit appointed counsel for a Petitioner under the Criminal Justice Act of 1964.

Dated this 21st day of August, 2003.

ALEXANDER F. REICHERT
REICHERT LAW OFFICE
405 Bruce Avenue, Suite 100A
Grand Forks, ND 58201
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Attorney for Billy Jo Lara

FILED
AUG 21 2003
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AUG 25 2003
OFFICE OF THE CLERK
SUPREME COURT, U.S.

19 pp

REICHERT LAW OFFICE
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(701) 775-2230 fax

August 21, 2003

Clerk, Supreme Court of the United States
Attn: Admissions Office
One First Street, N.E.
Washington, D.C. 20543-0001

RE: United States of America vs. Billy Jo Lara – Case No. C2-01-58

Good Morning:

Enclosed please find ten copies of a **Motion for Leave to Proceed In Form Pauperus** and **Respondent's Brief in Opposition.** Please note my new address. If you have any questions please do not hesitate to contact me.

Sincerely,

Alexander F. Reichert

Enclosure

Cc: Billy Jo Lara

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ORIGINAL

No. 03-107

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY JO LARA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

Argument 1

A. Congress Cannot Remove Impediments to the Exercise of Tribal Sovereign Powers; Therefore the ICRA Amendments Delegated Federal Authority to the Tribe and the Double Jeopardy Clause Prevents a Subsequent Federal Prosecution for the Same Offense 2

B. The Court of Appeals Correctly Interpreted the ICRA Amendment to Delegate Federal Prosecutorial Power to the Tribes 8

C. Only Two Circuits are in Conflict on this Issue and More Time is Needed to Determine How Other Circuits Will Resolve This Issue 9

D. The Question Presented in this Case Does Not Have the Significant Ramifications Envisioned by the Government 10

CONCLUSION 12

TABLE OF AUTHORITIES

United States Supreme Court Cases

Atkinson Trading Co. v. Shirley,
532 U.S. 645 (2001) 5

Duro v. Reina,
495 U.S. 676 (1990) 3, 4, 5, 6-7

Heath v. Alabama,
474 U.S. 82 (1985) 2-3

Hillside Dairy Inc. v. Lyons,
123 S.Ct. 2142 (2003) 7

Montana v. United States,
450 U.S. 544 (1981) 3-4

Nevada v. Hicks,
533 U.S. 353 (2001) 5, 9

Oliphant v. Suquamish Indian Tribe,
435 U.S. 191 (1978) 3, 7

Prudential Ins. Co. v. Benjamin,
328 U.S. 408 (1946) 7

South Dakota v. Bourland,
508 U.S. 679 (1993) 5

United States v. Wheeler,
435 U.S. 313 (1978) 4

United States Circuit Court of Appeals Cases

Eighth Circuit

United States v. Lara,
324 F.3d 635 (8th Cir. 2003)(en banc) 2, 5, 7, 10

United States v. Lara,
294 F.3d 1004 (8th Cir. 2002) 4

Statutes

U.S. Const. Amend. V ..... Passim

25 U.S.C. § 1301 4

25 U.S.C. § 1301(2) 4

STATEMENT OF THE CASE

There is one correction to the government's Statement of the Case. On page 6, the government claims that a conditional guilty plea was taken preserving only the double jeopardy claim. The conditional plea preserved the Motion to Dismiss Indictment for Violation of Double Jeopardy as well as the Motion to Dismiss Indictment for Selective Prosecution or to Allow Additional Discovery Regarding Selective Prosecution. The denials of each of these motions were appealed and both were presented in the Petition for rehearing en banc. The decision of the district court was affirmed as to both motions by the panel in the Eighth Circuit. When the Eighth Circuit announced its decision en banc, it presumably did not reach the second motion because it was moot after the dismissal of the indictment on double jeopardy grounds.

Mr. Lara still believes the second motion should have been granted and would ask that if the Court finds the Indictment should not be dismissed, then the Court should reverse the district court ruling on that motion or remand it to the Eighth Circuit for consideration.

ARGUMENT

A. Congress Cannot Remove Impediments to the Exercise of Tribal Sovereign Powers; Therefore the ICRA Amendments Delegated Federal Authority to the Tribe and the Double Jeopardy Clause Prevents a Subsequent Federal Prosecution for the Same Offense.

Mr. Lara's prosecution by the federal government was a violation of the Double Jeopardy Clause of the Fifth Amendment. The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The dual sovereignty doctrine limits the Double Jeopardy Clause from acting as a bar to successive prosecutions that are initiated by separate sovereigns. Mr. Lara pled guilty in tribal court and was indicted in federal court for offenses involving the exact same conduct. The question presented is whether these two courts derive their power from the same source or independent sources. The lower court ruled that both of these prosecutions were an exercise of federal power and thus violated the Double Jeopardy Clause. *See United States v. Lara*, 324 F.3d 635 (8th Cir. 2003)(en banc).

A crime is an offense against the sovereignty of a government. Under the dual sovereign doctrine, when a single act violates the sovereignty of two governments, the offender has actually committed two separate offenses. *See Heath v. Alabama*, 474 U.S. 82, 88 (1985). The dual sovereign doctrine only applies when two prosecuting entities derive their prosecutorial powers from independent sources. *See id.* at 90. In situations where a single act violates the

laws of two separate sovereigns, two offenses are committed which permits prosecution by both sovereigns without a violation of the Double Jeopardy Clause. *See id.*

In *Duro v. Reina*, 495 U.S. 676, 685 (1990), this Court ruled that tribes do not have inherent sovereign authority to prosecute non-member Indians. The Court reasoned when a criminal prosecution reflects a "manifestation of external relations between the Tribe and outsiders," including nonmember Indians, "such power would have been inconsistent with the Tribe's dependent status, and could only have come to the Tribe by delegation from Congress." *Id.* at 686. The fundamental status of an Indian who is not a member of the Tribe seeking to prosecute him is identical to that of a non-Indian. *See id.* at 693. Tribes do not have a sovereign power to prosecute non Indians. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Therefore, tribes do not have an inherent sovereign power to prosecute nonmember Indians. Mr. Lara was not a member of the tribe which prosecuted him. As such, he was prosecuted by the Tribe pursuant to delegated federal authority and his subsequent federal prosecution violates the Double Jeopardy Clause.

Another pre-*Duro* case examined retained sovereign powers of tribes and echoed the important distinction between members and non-members. In *Montana v. United States*, 450 U.S. 544, 564 (1981) the Court reiterated that, "[t]he areas in

which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." (quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978)).

In response to the holding in *Duro*, Congress amended the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C § 1301 *et seq.*, by defining "powers of self government" to mean "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C § 1301(2). The government claims this amendment is the reason that the holding in *Duro* no longer stands for the proposition that tribes do not have inherent power to prosecute non-member Indians. The Court has not interpreted the ICRA amendments to have changed the holding in *Duro*. In *Nevada v. Hicks*, 533 U.S. 353, 358-59 (2001) the Court cited *Montana* and *Oliphant* favorably for the proposition that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" in criminal matters.

The government claims that this attempt by Congress to overrule *Duro* is permissible because *Duro* was not a Constitutional case. This Court has seen otherwise. While the Court has not construed the post-*Duro* ICRA amendments, it has reaffirmed its limitation on tribal sovereign authority to tribe members.[1] *See*

[1] Chief Judge Hanson's dissent in the *Lara* panel decision, which was later vacated en banc, does a very nice job of explaining why the *Duro* decision is grounded in the Constitution. 294 F.3d 1004, 1008-09 (8th Cir. 2002).

United States v. Lara, 324 F.3d 635, 638 (8th Cir. 2003) (citing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) and *Nevada v. Hicks*, 533 U.S. 353, 358-59 (2001)). This Court reaffirmed the fact that tribal jurisdiction over non-members of the tribe is not inherent because it cannot survive without an express congressional delegation. *See South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993).

Contrary to the government's assertion otherwise, *Duro* is a constitutional case. The decision was based on the powers and limitations found in the Constitution. For example, as the Court stated:

> Whatever might be said of the historical record, we must view it in light of petitioner's status as a citizen of the United States .... That Indians are citizens does not alter the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits. In the absence of such legislation, however, Indians like other citizens are embraced within our Nation's great solicitude that its citizens be protected ... from unwarranted intrusions on their personal liberty.

Duro, 495 U.S. at 692-93. "Unwarranted intrusions" on a person's liberty is a concept taken directly from the Fifth Amendment of the Constitution. As the Court stated in *Duro*: "[a]s full citizens, Indians share in the territorial and political sovereignty of the United States." *Id.* at 709. This reference can not be interpreted to exclude the constitutional guarantees found in the Fifth Amendment.

The Court further recognized the Constitution's limiting authority with respect to Congressional Power over Indian law: "Our cases suggest constitutional

limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right." *Id.* at 693. The constitutional consideration which concerned the Court in *Duro* was "an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system." *Id.* at 694. Finally, the Court noted: "We cannot, however, accept these arguments of policy as a basis for finding tribal jurisdiction that is inconsistent with precedent, history, and the equal treatment of Native American citizens." *Id.* at 698. Equal treatment of citizens in the eyes of the law is a basic principle of the United States Constitution. As these references demonstrate, the Court recognized the Constitutional impact of its decision in *Duro*.

The government's contention that *Duro* was not a constitutional holding seems to ignore the constitutional references. The constitutionality of the *Duro* holding is not grounded so much in the treatment of the tribes as it is in the treatment of the individual. *See id.* at 692. It is Mr. Lara's individual rights that are implicated by his prosecution by a sovereign which does not afford him his constitutional rights and to which he has not consented. This is a key distinction between the treatment of a member of a tribe in *Wheeler* and non-members of the tribe in *Oliphant* and *Duro*. The Court in *Duro* emphasized that "petitioner's status as a citizen of the United States" grants protection "from unwarranted

intrusion on [his] personal liberty." *Id.* (citing *Oliphant*, 435 U.S. at 210).

The government's final contention in Section A is that Congress could authorize a power that the tribes would otherwise lack even if *Duro* was based on the Constitution. This is true. Congress can authorize tribes to prosecute non-member Indians and this is the holding of the lower court. *See Lara*, 324 F.3d at 640. By this authorization, Congress has given the tribes federal power to prosecute nonmembers. *See id.* at 640.

Although unclear from its argument, it is assumed that government is of the view that Congress can delegate criminal jurisdiction without running afoul of the Double Jeopardy Clause. This is untrue. The cases cited by the government to support its argument do not stand for this proposition. The government cites two cases wherein Congress allowed States to take action which would otherwise violate the Commerce Clause. See *Hillside Dairy Inc. v. Lyons*, 123 S.Ct. 2142 (2003) and *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946). These were civil cases and therefore did not raise the Constitutional question of Double Jeopardy. In these cases, the States were using a federal power and therefore, the delegation in these cases was the power of one sovereign not two. Congress cannot fix the constitutional problem in Mr. Lara's case in the same way it can authorize States to take action which would otherwise violate the Commerce Clause. If the recognition of inherent sovereignty is unconstitutional, then so to is the

authorization of sovereignty. This is a delegation of federal power from Congress and it results in double jeopardy no matter what it is called by Congress.

Congress does have broad powers concerning the treatment of Indians, but it does not have the power to recognize a sovereignty which this Court has already determined does not exist, especially, when the recognition of this sovereignty violates the Constitution of the United States.

B. The Court of Appeals Correctly Interpreted the ICRA Amendment to Delegate Federal Prosecutorial Power to the Tribes.

Congress's intent in amending ICRA was to correct an error which it felt this Court committed. The government argues that the lower court erred by not construing the tribal grant of power in ICRA as a legal nullity. This would have the effect of invalidating Mr. Lara's tribal conviction. Without the valid tribal conviction, the government argues, the second prosecution is really the first and there is no Double Jeopardy.

The government's argument on this issue misses a very important point. The Double Jeopardy Clause protects a person from being twice put in jeopardy for the same crime. If the Eighth Circuit's interpretation of the statue as a delegation of power is incorrect, it does not change the fact that Mr. Lara was put in jeopardy for a crime. In fact, he was more than put in jeopardy, he actually lost his liberty in the tribal court. Mr. Lara's tribal prosecution may be expunged from his record (if a habeas petition is successful), but his loss of liberty cannot be restored. It would

be an odd result for Mr. Lara to have his position affirmed and still be sentenced in a federal court for a crime he was already punished for in tribal court. This was certainly not the result the framers of the Constitution envisioned when drafting the Double Jeopardy Clause.

Congress intended to give tribes misdemeanor jurisdiction over nonmember Indians. The fact that they improperly termed it as a recognition of inherent sovereignty does not change the fact that the law's purpose was one of tribal law enforcement. It is doubtful that Congress did not want tribes to be able to prosecute nonmember Indians. Congress was acting to fill a perceived void in jurisdiction. The fact that Congress erred does not change its intent to delegate jurisdiction to the tribes over non-member Indians in criminal cases. The concurrence by Justice Souter in *Hicks* confirms this contention that "Congress passed a statute expressly granting tribal courts [criminal jurisdiction over nonmember Indians]." 533 U.S. at 377 n.2.

C. Only Two Circuits are in Conflict on this Issue and More Time is Needed to Determine How Other Circuits Will Resolve This Issue.

While it is true that there is a conflict between the Eighth and Ninth Circuits on the issue presented in this case, this conflict has not been fully examined by the other circuits. Allowing more time for the other circuits to weigh in on this issue will give this Court a more complete picture.

Allowing more time will also allow Congress to close any perceived gap in jurisdiction. Action by Congress may make any decision on this case moot. If Congress amends ICRA to show a clear delegation of its power to the tribe, or if Congress takes some other step to alleviate the problems claimed by the government, then this issue becomes moot.

If the government is truly concerned that this decision will cause problems in tribal law enforcement, they are free to lobby Congress for changes which would correct this problem.

D. The Question Presented in this Case Does Not Have the Significant Ramifications Envisioned by the Government.

The government contends on page 20 of its Petition for a Writ of Certiorari that many problems will arise if the decision of the Eighth Circuit is allowed to stand. These problems are not as severe as the government makes them out to be and they do not justify granting a Writ of Certiorari.

The first contention is that misdemeanors are best prosecuted by the tribes. This is true and the *Lara* decision in the Eighth Circuit does nothing to change this. *See* 324 F.3d 635. Misdemeanors committed by all Indians can still be prosecuted by any tribe even in the Eighth Circuit. The *Lara* decision ruled that the ICRA amendment served to delegate federal authority for prosecution of misdemeanors to the tribes. *Id.* at 640. Therefore, the problem complained of by the government does not exist.

The second contention is essentially that a nonmember Indian may quickly plead guilty to a misdemeanor and foreclose the government from charging a more serious felony. This concern of the government is real, however, its impact is within the control of the government. Every state has a U.S. Attorney's office and they regularly communicate with tribal prosecutors. While the government alleges that U.S. Attorneys are overworked, it can be argued that tribal prosecutors are just as busy if not more busy than their federal counterparts. It would be a rare case where a tribal prosecutor would not defer to his or her colleagues at the U.S. Attorney's office to reduce his caseload and get a more appropriate sentence.

The government's contention assumes that the defendant is the only person involved in the decision to charge an offense or plead guilty. A defendant cannot force a tribal prosecutor to charge him. A defendant cannot plead guilty to an offense without the prosecutor's knowledge. Not only must the prosecutor be involved in this decision, but the Judge is also involved. The Judge must accept the guilty plea and it can be assumed that if the Judge questions the appropriateness of a misdemeanor charge, the prosecutor will be asked if the U.S. Attorney has had appropriate input on the case. The government's concern on this point would require a breakdown of the system involving the prosecutor, the Judge and even the U.S. Attorney.

There is no contention that tribal prosecutors care less about law enforcement than U.S. Attorneys. There is no contention that these tribal prosecutors are corrupt or that they are waiting in the wings to allow murderers to plead guilty to assault in tribal court and avoid murder charges in the Federal Courts because of Double Jeopardy.

As a practical matter, this ruling should significantly increase cooperation between Federal and Tribal prosecutors. This cooperation can only enhance the overall administration of justice on the reservations.

CONCLUSION

For the reasons stated above respondent Billy Jo Lara respectfully requests that this Court deny the government's Petition for a Writ of Certiorari should be denied.

Respectfully submitted. this 21st day of August, 2003.

August 21, 2003

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No. 03-107

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY JO LARA, RESPONDENT

PROOF OF SERVICE

I, Alexander F. Reichert, do swear or declare that on this date, August 21, 2003 as required by Supreme Court Rule 29 I have served the enclosed **Motion for Leave to Proceed In Form Pauperus** and **Respondent's Brief in Opposition** on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelop containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Theodore B. Olson
Solicitor General of the United States
Department of Justice
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 21, 2003.

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(14)

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IN THE

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UNITED STATES OF AMERICA,
Petitioner,

v.

BILLY JO LARA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF RESPONDENT BILLY JO LARA

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. THE COURT CORRECTLY RULED IN *DURO V. REINA* THAT TRIBES DO NOT POSSESS INHERENT SOVEREIGN POWER TO PROSECUTE NON-MEMBER INDIANS	4
A. The Court Need Not Overrule Or Review The Dual Sovereignty Doctrine	5
B. The Court Correctly Held In *Duro v. Reina* That A Non-Member Indian's Status As A United States Citizen Precludes Tribal Prosecutions Absent Congressional Delegation	7
1. The Court's holdings in *Oliphant* and *Wheeler* established the constitutional limits of tribal prosecutorial authority	7
2. *Duro v. Reina* extended the holdings of *Oliphant* and *Wheeler* to non-member Indians	9
C. This Court's Prior And Subsequent Rulings Support The Court's Holding In *Duro v. Reina*	12
II. THE COURT'S HOLDING IN *DURO V. REINA* WAS BASED ON CONSTITUTIONAL PRINCIPLES AND CONGRESS CANNOT LEGISLATIVELY REVERSE THE COURT'S INTERPRETATION OF THE CONSTITUTION	15

TABLE OF CONTENTS—Continued

	Page
A. The Court Decided *Duro* As A Constitutional Case	15
B. Even If *Duro* Is Not A Consitutional Decision, Every Congressional Action Is Subject To Consitutional Review	19
III. RESPONDENT'S FEDERAL PROSECUTION VIOLATED THE FIFTH AMENDMENT'S DOUBLE JEOPARDY CLAUSE AND SHOULD NOT STAND	23
A. The Delegation Of Congressional Authority To Prosecute Non-Member Indians Was Proper	23
B. Jeopardy Attached To Respondent's Tribal Court Prosecution And His Subsequent Federal Prosecution Is Double Jeopardy	25
C. The Government's Remaining Policy-Based Arguments Are Either Irrelevent To The Protection Of Respondent's Constitutional Rights, Wrongly Presented, Or Both	28
CONCLUSION	33

TABLE OF AUTHORITIES

CASES	Page
Argersinger v. Hamlin, 407 U.S. 25 (1972)	22
Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001)	2, 14, 15
Bartkus v. Illinois, 359 U.S. 121 (1959)	5
Cherokee Nation v. Georgia, 5 Pet. 1 (1831)	7
City of Bourne v. Flores, 521 U.S. 507 (1997)	19, 21
City of Milwaukee v. Illinois, 451 U.S. 304 (1981)	20
Clanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973)	13
Duro v. Reina, 495 U.S. 676 (1990)	*passim*
Gideon v. Wainwright, 372 U.S. 335 (1963)	29
Grafton v. United States, 205 U.S. 333 (1907)	26, 27
Heath v. Alabama, 474 U.S. 82 (1985)	5, 6
Kepner v. United States, 195 U.S. 100 (1904)	26
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	4, 12, 19, 21
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)	21
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)	11
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)	13
Montana v. United States, 450 U.S. 544 (1980)	2, 12, 15
Morton v. Mancari, 417 U.S. 535 (1974)	21
Negonsott v. Samuels, 507 U.S. 99 (1993)	20
Nevada v. Hicks, 533 U.S. 353 (2001)	2, 14, 15, 23
New Jersey v. New York, 283 U.S. 336 (1931)	20
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	*passim*
Reid v. Convert, 354 U.S. 1 (1957)	11, 22
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	11, 20

TABLE OF AUTHORITIES—Continued

	Page
Serfrass v. United States, 420 U.S. 377 (1975)	26
South Dakota v. Bourland, 508 U.S. 679 (1993)	2, 13, 15, 18
Stephens v. Cherokee Nation, 174 U.S. 445 (1889)	20
Talton v. Mayes, 163 U.S. 376 (1896)	17
United States v. Alcea Band of Tillamooks, 329 U.S. 40 (1946)	20, 21
United States v. Antelope, 430 U.S. 641 (1977)	21
United States v. Ball, 163 U.S. 662 (1896)	26
United States v. Creek Nation, 295 U.S. 103 (1935)	16
United States v. Kagama, 118 U.S. 375 (1886)	13
United States v. Lara, 324 F.3d 635 (8th Cir. 2003)	15, 23
United States v. Long, 324 F.3d 475 (7th Cir. 2003), *cert. denied*, 124 S.Ct. 151 (2003)	13
United States v. Lopez, 514 U.S. 549 (1995)	21
United States v. Mills, 964 F.2d 1086 (D.C. Cir. 1992) (en banc), *cert. denied*, 506 U.S. 977 (1992)	24
United States v. Phelps, 168 F.3d 1048 (8th Cir. 1999)	26, 27
United States v. Sioux Nation of Indians, 448 U.S. 371	16
United States v. Smith, 915 F.2d 322 (9th Cir. 1990)	25
United States v. Wheeler, 435 U.S. 313 (1978)	*passim*
Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966)	20
Williams v. Lee, 358 U.S. 217 (1959)	13

TABLE OF AUTHORITIES—Continued

CONSTITUTION, TREATIES, AND STATUTES — Page

U.S. Const. Art I, § 8, Cl. 3	20, 21
U.S. Const. Art. X	21
8 U.S.C. § 1401(b)	18
25 U.S.C. § 1301(2)	12, 21, 23, 25
25 U.S.C. § 1301(4)	12
U.S. Const. Amend V	5
U.S. Const. Amend VI	22
Treaty with the Sissiton and Wahpaton Bands of Dakota or Sioux Indians, June 19, 1858; ratifies March 9, 1859; proclaimed March 31, 1859 Art. VI 12 Stat. 1037	9
Act of Aug. 15, 1953, Pub. L. No. 83-280 Ch. 505, 67 Stat. 588	25

MISCELLANEOUS

Brief of *Amicus Curiae* State of Idaho, *et al*	25
Felix Cohen, *Handbook of Federal Indian Law*, 142-43 (1982); Pub. L. No. 68-175, 43 Stat. 253	18
Impact of the Supreme Court's Ruling in Duro v. Reina*: Hearing Before the Senate Select Committee on Indian Affairs*, 102nd Cong., 1st Session. Pt.2 (1991)	29
5 Wayne R. LaFave, *et al, Criminal Procedure*, §25.1(d) (2d ed. 1999)	26
S. Rep. No. 168, 102d Cong., 1st Sess. (1991)	30
2002 U.S. Dept. of Justice Ann. Rep., U.S. Attorneys' Annual Statistical Rep.	31

IN THE

Supreme Court of the United States

No. 03-107

UNITED STATES OF AMERICA,
Petitioner,

v.

BILLY JO LARA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF RESPONDENT BILLY JO LARA

SUMMARY OF ARGUMENT

1. This Court correctly ruled in *Duro v. Reina*, 495 U.S. 676 (1990), that tribal courts do not possess inherent sovereignty to prosecute non-member Indians in tribal court.[1] Contrary to the government's position, Respondent Billy Jo Lara's tribal prosecution does not implicate the dual sovereignty doctrine. *Duro* and this case differ from *United States v. Wheeler*, 435 U.S. 313 (1978). There, the Court ruled that tribal courts possess inherent sovereignty to

---

[1] A "non-member Indian" is an Indian enrolled in a federally recognized tribe different than his/her own tribe.

prosecute tribal members, and a tribal member's prosecution in both tribal and federal court does not violate the Double Jeopardy Clause of the Fifth Amendment. Here, Congress's grant of authority to the tribes to prosecute non-member Indians necessarily constituted a delegation of federal power. As such, Respondent's tribal and federal prosecutions were conducted under the same sovereign power, and the Double Jeopardy Clause applies.

The Court should uphold its ruling in *Duro v. Reina*. *Duro* is a logical extension of the Court's ruling that tribal courts do not possess inherent sovereignty to prosecute non-Indians, *see Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), but do possess inherent sovereignty to prosecute enrolled tribal members, *see Wheeler*, 435 U.S. 313. In *Duro*, the Court correctly determined that Indian tribes did not possess inherent tribal sovereignty to prosecute non-member Indians. Specifically, the Court held that the tribe surrendered its inherent sovereignty to prosecute non-member Indians when the tribe submitted itself to the over-arching authority of the United States. Further, the Court reasoned that because non-member Indians are United States citizens who do not possess any right of self determination in tribal governments other than their own, the Court's prior holding in *Wheeler* was not applicable. Non-member Indians more closely resemble the non-Indians in *Oliphant* than the member Indians in *Wheeler*.

Moreover, the Court's holding in *Duro* is supported by both prior and later opinions. *Montana v. United States*, 450 U.S. 544 (1980), *South Dakota v. Bourland*, 508 U.S. 679 (1993), *Nevada v. Hicks*, 533 U.S. 353 (2001), and *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), all support the proposition that tribes do not possess inherent sovereignty to regulate the conduct of non-Indians and non-member Indians.

2. Because the Court's decision is based on the Constitution and is supported by constitutional underpinnings, Congress did not possess the authority to overrule *Duro*

legislatively. Congress exceeded its authority when it amended the Indian Civil Rights Act and purported to "restore" the tribe's "inherent sovereignty" to prosecute "all Indians." Because of the constitutional implications surrounding tribal sovereign power, this Court, not Congress, possesses the authority and the duty to determine the nature and extent of tribal sovereign power. The holding in *Duro* established that whatever sovereign power tribes previously possessed was surrendered upon the tribes' submission to the federal government. Thus, Congress cannot restore that which was necessarily surrendered.

Even if the Court determines that its holding in *Duro* was not based on the Constitution, Congress's actions are not unfettered and are always subject to the constraints of the Constitution. The Court possesses the power and the duty to determine "what the law is," and must examine every congressional action in the light of the enumerations and protections provided by the Constitution.

3. The court of appeals correctly determined that Congress's 1991 amendments to the Indian Civil Rights Act constituted a delegation of federal authority. Because the tribes did not possess inherent sovereignty to prosecute non-member Indians, any congressional action recognizing the tribes' ability to do so necessarily constitutes a delegation of federal authority.

Respondent was prosecuted in a tribal court pursuant to a congressional grant of authority, pled guilty, and was incarcerated for a period of ninety days. Under such circumstances, jeopardy attached to Respondent's tribal prosecution. Any subsequent prosecution for the same offense would violate the Double Jeopardy Clause.

The government's policy-based arguments ignore the fact that Respondent and all other Indians are U.S. citizens. The government's contention that the tribal courts, by affording

some constitutional rights to criminal defendants, adequately protect those defendants' rights ignores this fact. Moreover, contrary to the government's allegations, congressional delegation of federal prosecutorial authority to tribal courts would not result in a breakdown of the criminal justice system, but rather would increase tribal and federal cooperation on the Indian reservations.

ARGUMENT

I. THE COURT CORRECTLY RULED IN *DURO V. REINA* THAT TRIBES DO NOT POSSESS INHERENT SOVEREIGN POWER TO PROSECUTE NON-MEMBER INDIANS.

The fundamental question presented in this case is as follows: Is it the role of this Court, or the role of Congress, to determine the nature and extent of inherent tribal sovereignty? The underpinnings of inherent tribal sovereignty are found in the Constitution. As such, it is this Court, not Congress, that must act as the final authority on the limits of inherent tribal sovereignty. It is the Court's responsibility to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Based on the powers and limits of the United States Constitution, Respondent respectfully requests that this Court affirm its holding in *Duro v. Reina*, 495 U.S. 676 (1990), and affirm the dismissal of Respondent's federal indictment.[2]

[2] Respondent's conditional guilty plea preserved the Motion to Dismiss Indictment for Violation of Double Jeopardy and the Motion to Dismiss Indictment for Selective Prosecution or to Allow Additional Discovery Regarding Selective Prosecution. The district court's decision denying both motions was affirmed by the panel in the court of appeals. Respondent presented both to the court of appeals in his Petition for Rehearing en banc. When the court of appeals issued its en banc decision, it presumably did not reach the second motion because it was moot after the dismissal of the indictment on Double Jeopardy grounds. Respondent contends the Motion to Dismiss for Selective Prosecution should have been granted and would ask that if the Court reverses the decision of the court of appeals, the Court should also reverse the district court's ruling on the Motion for Selective Prosecution, or remand it to the court of appeals for re-consideration.

A. The Court Need Not Overrule Or Review The Dual Sovereignty Doctrine.

Respondent contends that his tribal and subsequent federal prosecutions for the same offense derived their authority from the same source of power and constitute a violation of the Double Jeopardy Clause. *See* U.S. Const. Amend. V. In its opening argument, the government contends that Respondent's prosecutions in both tribal and federal court did not amount to a violation of the Double Jeopardy Clause of the Fifth Amendment because of the exceptions found in the dual sovereignty doctrine. The dual sovereignty doctrine, however, does not apply because both of Respondent's prosecutions were based on federal power.

The Double Jeopardy Clause states that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. This constitutional protection, however, does not apply to a defendant prosecuted by two different sovereigns, even if the two prosecutions require proof of the same elements, because this Court has held that violations of two different sovereigns' laws do not constitute the same "offense." *See Heath v. Alabama*, 474 U.S. 82, 88 (1985); *Bartkus v. Illinois*, 359 U.S. 121 (1959).

Dual sovereignty is based on the principle that a crime can be committed against two separate sovereigns through the commission of a single act. *See Heath*, 474 U.S. at 88. For the doctrine to apply, it is pivotal that "the two entities draw their authority to punish the offender from distinct sources of power." *Id.* at 88. If the second entity draws its prosecutorial authority from the same source of power as the first entity,

then only one sovereign has been offended, and only one offense committed. *See id.* at 90. The second prosecution of the same offense then violates the Double Jeopardy Clause. *See, e.g., United States v. Wheeler*, 435 U.S. 313, 318 (1978).

Although a reversal of the dual sovereignty doctrine would result in the dismissal of Respondent's federal indictment, the Court need not overrule or even review its precedent discussing the dual sovereignty doctrine. Respondent respectfully disagrees with the Court's holding in *Heath*, but contends that an exhaustive review of this doctrine is unnecessary for the Court to affirm or overrule the decision of the court of appeals. The court of appeals presumed the validity of the dual sovereignty doctrine and still held that Respondent's subsequent federal prosecution violated the Double Jeopardy Clause.

The essential issue before the Court is whether this Court or Congress has the superior power to determine and define the constitutional limits of tribal sovereignty. If the Court determines that it possesses such authority, then the Court should reaffirm its holding in *Duro v. Reina*, 495 U.S. 676 (1990), that tribes lack inherent authority to prosecute non-member Indians. The Court's decision regarding the constitutional limits of tribal sovereignty cannot be legislatively reversed by Congress. Any delegation of authority to prosecute non-member Indians would be based on federal authority, and Respondent's subsequent federal prosecution would violate the Double Jeopardy Clause. Respondent respectfully contends that the dual sovereignty doctrine only applies if the Court first determines that its authority to define the limits and nature of tribal sovereignty is subject to congressional defeasance.

B. The Court Correctly Held In *Duro v. Reina* That A Non-Member Indian's Status As A United States Citizen Precludes Tribal Prosecutions Absent Congressional Delegation.

1. *The Court's holdings in* Oliphant *and* Wheeler *established the constitutional limits of tribal prosecutorial authority.*

In 1978, the Court issued the two seminal rulings on tribal jurisdiction. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court determined that tribes do not have sovereign power to prosecute non-Indians. In *United States v. Wheeler*, 435 U.S. 313 (1978), the Court held that tribal courts did have sovereign power to prosecute tribal members. The case currently before the Court exists at the intersection of *Oliphant* and *Wheeler*. The issue presented is whether the tribe has sovereign power to prosecute non-member Indians in tribal court. The Court answered this question in *Duro v. Reina*, 495 U.S. 676 (1990), holding that tribes do not possess the authority to prosecute non-member Indians.

In *Oliphant*, the Court considered whether the tribe could exercise criminal jurisdiction over two resident non-Indians for crimes committed on the Port Madison Reservation near Seattle, Washington. *See* 435 U.S. at 194. The tribe based its assertion of criminal jurisdiction over non-Indians on the "Tribe's retained inherent powers of government over the Port Madison Indian Reservation." *Id.* at 196. Following an extensive review of Federal Indian law, the Court rejected the tribe's position. *See id.* at 208. Specifically, the Court stated that

> Indian Tribes do retain elements of "quasi-sovereign" authority after ceding their lands to the United States and announcing their dependence on the Federal Government. *See Cherokee Nation v. Georgia*, 5 Pet. 1, 15 (1831). But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or

> congressional enactments. As the Court of Appeals recognized, Indian tribes are prohibited from exercising those powers of autonomous states that are expressly terminated by Congress and those powers "inconsistent with their status" [as dependants of the United States].

Oliphant, 435 U.S. at 208. In determining the limits on tribal sovereignty, the Court provided that

> [t]he tribes' retained powers are not such that they are limited only by specific restrictions in treatises or congressional enactments . . . . Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the Untied States and their exercise of separate power is constrained so as not to conflict with the interest of this overriding sovereignty. "[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished."

Id. at 208-09 (alterations in original) (citations omitted). The Court concluded that "an examination of our earlier precedents satisfies us that, even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress." *Id.* at 208. Thus, in *Oliphant*, the Court established the initial framework that Indian tribes' criminal jurisdiction encompassed only powers found in treaties, congressional delegations, and those inherent powers whose exercise did not conflict with the tribes' dependant status.[3]

---

[3] Respondent contends that the provisions of the treaty that recognized and later created the reservation on which he was prosecuted expressly prohibited tribal prosecution of non-member Indians. Article VI of the 1858 Treaty with the Sissiton and Wahpaton Bands of Dakota or Sioux Indians specifically states

> [The Sissiton and Wahpaton Bands of the Dakota or Sioux Indians] further pledge themselves not to engage in hostilities with the Indians of any other tribe . . . but to submit . . . all matters of dispute and difficulty between themselves and other Indians for the decision of the President of the United States, and to acquiesce in and abide thereby.

12 Stat. 1037, art. VI (June 19, 1858; ratified Mar. 9, 1859; proclaimed Mar. 31, 1859). By executing this Treaty and agreeing to submit to the overriding authority of the United States, the tribe surrendered any sovereign power it previously possessed to prosecute non-member Indians.

Shortly after *Oliphant*, the Court addressed the tribes' sovereign power to prosecute their own tribal members in *United States v. Wheeler*, 435 U.S. 313. There, the Court considered whether the Navajo tribe's authority to prosecute its own members was derived from retained, inherent sovereignty or from delegated, congressional power. *See id.* at 316. As in *Lara*, the case presently before the Court, Wheeler faced prosecutions in both tribal and federal court, forcing the Court to examine the nature and extent of tribal sovereignty. *See id.* at 316-18. In determining that Wheeler's tribal prosecution was pursuant to the tribe's inherent sovereign power, the Court stated "[i]t is undisputed that Indian tribes have power to enforce their criminal laws against tribe members. . . . Their right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions." *Id.* at 322 (citations omitted.) The Court stated that this inherent authority was not lost due to the tribe's dependant status. *See id.* at 326. Tribal authority, however, had been implicitly divested in areas "involving the relations between an Indian tribe and non-members of the tribe." *Id.*

2. Duro v. Reina *extended the holdings of Oliphant and Wheeler to non-member Indians.*

In *Duro v. Reina*, 495 U.S. 676 (1990), the Court examined whether a tribe retained the inherent sovereignty to prosecute

a non-member Indian or whether such an exercise of prosecutorial jurisdiction amounted to an exercise of power that was "inconsistent with its dependant status." *Oliphant*, 435 U.S. at 208. Simply put, the Court was faced with determining whether a non-member Indian was more like the non-Indians in *Oliphant* or the tribal member in *Wheeler*.

Ultimately, the Court held that a tribe's criminal jurisdiction extended only to member Indians, and that any power to prosecute non-member Indians was inconsistent with its dependant status. *See Duro*, 495 U.S. at 686. Thus, the Court determined that any criminal jurisdiction a tribe may have over non-member Indians must come from a congressional delegation of authority, subject to the constraints and protections of the Constitution. *See id.* Such constitutional protections were necessary because "[t]he exercise of criminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe, and involves a far more direct intrusion on personal liberties." *Id.* at 688.

The Court emphasized that all Indians are full citizens of the United States, and regardless of any historical record concerning tribal criminal jurisdiction, all Indians "are embraced with our Nation's 'great solicitude that its citizens are protected . . . from unwarranted intrusions on their personal liberty.'" *Duro*, 495 U.S. at 692 (quoting *Oliphant*, 435 U.S. at 210.) "Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States." *Id.* at 693. The Court further stated that

> [t]he retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members. . . . A tribe's additional authority comes from the consent of its members, and so the criminal sphere of membership marks the bounds of tribal authority.

Id. Explicit in the Court's holding is the principle that consent to be recognized as an Indian does not equate to the voluntary submission to every tribes' criminal jurisdiction.

The Court additionally noted that any congressional delegation of authority to tribal courts would be subject to the limitations found in the Constitution. *Id.* (citing *Reid v. Convert*, 354 U.S. 1, 39-40 (1957)). The same holds true for tribal authority over its members. "Retained criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent." *Id.* at 694. A tribal member's consent to be governed is essential because "the tribes are left with broad freedom not enjoyed by any other governmental authority in this country." *Id.* (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 n.7 (1978)). It is the consent of its members that permits tribal government to dilute those members' constitutional rights. *See id.* at 694. For example, the Bill of Rights, in toto, is not applicable to Indian tribes. *See id.* (citing *Santa Clara Pueblo*, 436 U.S. at 56 n.7). "This is all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system." *See id.* at 694 (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 172, 173 (1982) (Stevens, J., dissenting)). It is this constitutional system that necessarily limits Congress's plenary powers and subjects every congressional action to this Court's review.

In light of *Oliphant*, *Wheeler*, and the fact that all Indians are full citizens of the United States, the Court in *Duro* concluded that a non-member's inability to participate in tribal government precluded the tribe's exercise of criminal jurisdiction over the non-member Indian. The Court's hold-

ing in *Duro* treats non-member Indians like non-Indians, as in *Oliphant*.

In direct response to the Court's ruling in *Duro*, Congress amended the Indian Civil Rights Act ("ICRA") to provide that the "powers of self-government" included "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2). Congress further amended ICRA to define "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153 of Title 18 if that person were to commit an offense listed in that section in Indian country to which that section applies." *Id.* § 1301(4). Congress however, acted improperly in attempting to overrule legislatively the Court's decision in *Duro*, a ruling principally grounded in the Constitution.

C. This Court's Prior And Subsequent Rulings Support The Court's Holding In *Duro v. Reina*.

Both before and after the Court's ruling in *Duro*, the Court has issued opinions describing the nature and extent of inherent tribal sovereignty. Congress's plenary power is limited by "judicially enforceable outer limits," including the "judiciary's duty to say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177. As such, the Court's opinions, coupled with the Court's holdings in *Oliphant* and *Wheeler*, form the backbone of federal Indian law as it pertains to tribal jurisdiction and ultimately support and uphold the Court's ruling in *Duro*.

In 1980, the Court issued its decision in *Montana v. United States*, 450 U.S. 544 (1980). In *Montana*, the Court considered the power of the tribe to regulate non-Indian hunting and fishing on reservation land owned in fee simple by "non-members of the Tribe." *Id.* at 557. In considering the issue, the Court reviewed the applicable treaties as well as its precedent interpreting similar treaties. *See id.* at 550-57.

Following this review, the Court held that neither the tribe's treaties with the United States nor its retained, inherent sovereignty permitted the tribe to regulate such activity. *See id.* at 557. The Court, relying on *Wheeler*, recognized that tribal governments retained some sovereign powers, "[b]ut the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependant status of the tribes, and so cannot survive without express congressional delegation." *Id.* at 564 (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *Williams v. Lee*, 358 U.S. 217, 219-20 (1959); *United States v. Kagama*, 118 U.S. 375, 381-82 (1886); *Clanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171 (1973)). The Court then considered the proposed regulation in light of *Oliphant* and stated that *Oliphant* supported the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe." *Id.* at 565. In so holding, the Court reaffirmed the principles stated in *Oliphant* and *Wheeler*, that a tribe's inherent sovereign powers only extend to members of the tribe.

Although this case represents the Court's first opportunity to construe Congress's 1991 amendments to ICRA, the Court has affirmed the principle that tribes do not possess inherent sovereignty over non-member Indians, and that criminal jurisdiction over non-member Indians exists only pursuant to an affirmative delegation from Congress.[4] In *South Dakota v.*

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[4] The government and *amici* cite *United States v. Long*, 324 F.3d 475, 483 (7th Cir. 2003), *cert. denied*, 124 S.Ct. 151 (2003) (Oct. 6, 2003), as an example of Congress "restoring" a tribe's inherent sovereignty. (*See* Petitioner's Brief, at 26 n.6.) As the court of appeals recognized in *Long*, however, the situation in that case does not involve the issues currently before the Court. *See* 324 F.3d at 483. The powers Congress extended to the Menominee tribe, *see* 25 U.S.C. § 903-903f, did not involve the establishment of new "inherent" rights. *See Long*, 324 F.3d at 483. By re-establishing the Menominee tribe by congressional recognition,

Bourland, 508 U.S. 679 (1993), a case concerning tribal hunting regulations for non-Indians on tribal lands, the Court stated that

> [t]he dissent's complaint that we give "barely a nod" to the Tribe's inherent sovereignty argument is simply another manifestation of its disagreement with *Montana*, which announced "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe." 450 U.S. at 565. While the dissent refers to our "myopic focus" on the Tribe's prior treaty right to "absolute and undisturbed use and occupation" of the taken area, it shuts both eyes to the reality that after *Montana*, tribal sovereignty over non-members "cannot survive without express congressional delegation,' 450 U.S. at 564, *and is therefore not inherent*.

Bourland, 508 U.S. at 695 n.15 (emphasis added).

Most recently, the Court addressed the issue of inherent tribal sovereignty in *Nevada v. Hicks*, 533 U.S. 353, 358-59 (2001). In *Hicks*, the Court affirmed the general principle that tribes cannot exercise jurisdiction over non-members in a manner inconsistent with the tribe's dependant status, unless via a congressional delegation. *See id.* at 358-59. Moreover, the concurring opinion in *Hicks* provides that the Court's decision in *Duro* specifically recognized that inherent tribal sovereignty did not extend to non-member Indians and that "Congress passed a statute expressly granting tribal courts such jurisdiction." *Id.* 533 U.S. at 377 n.2 (Souter, J. concurring). The concurring opinion then explained that "[in *Hicks*] we are concerned with the extent of the tribes' inherent authority and not with the jurisdiction statutorily conferred upon them by Congress . . ." *Id.*; *see also Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (declining to impose a

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Congress merely recognized the tribal rights that Congress had previously taken away from the Menominee. *See id.*

hotel occupancy tax on a non-member-owned reservation hotel on non-Indian land).

By definition, inherent sovereignty existed independent of congressional recognition, and any recognition of tribal criminal jurisdiction over non-member Indians is necessarily a delegation of federal authority to the tribe. *See Bourland*, 508 U.S. at 695 n.15 (citing *Montana*, 450 U.S. at 564). As the Court held in *Duro* and affirmed most recently in *Bourland, Hicks* and *Atkinson*, tribal sovereign power does not permit criminal or regulatory jurisdiction over non-Indians or non-member Indians.

II. THE COURT'S HOLDING IN *DURO V. REINA* WAS BASED ON CONSTITUTIONAL PRINCIPLES AND CONGRESS CANNOT LEGISLATIVELY REVERSE THE COURT'S INTERPRETATION OF THE CONSTITUTION.

A. The Court Decided *Duro* As A Constitutional Case.

The court of appeals correctly recognized that this Court's decision in *Duro v. Reina*, 495 U.S. 676, was grounded in constitutional principles and that Congress lacks the authority to reverse the decision legislatively. *See United States v. Lara*, 324 F.3d 635, 639-40 (8th Cir. 2003) (en banc). As acknowledged by the court of appeals, "the distinction between a tribe's inherent and delegated powers is of constitutional magnitude and therefore is a matter ultimately entrusted to the Supreme Court. Absent a delegation from Congress, a tribe's powers are those "inherent powers of a limited sovereignty which [have] never been extinguished." *Id.* at 639 (internal quotations and citations omitted). As a result, "[o]nce the federal sovereign divests a tribe of a particular power, it is no longer an inherent power and it may only be restored by delegation of Congress's power." *Id.*

While Respondent acknowledges that Congress has broad plenary power to regulate tribal affairs, *see Wheeler*, 435 U.S. at 319, Congress's power is subject to the limitations imposed by the Constitution. The Court has long recognized that "'this power to control and manage [is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in . . . a guardianship and to pertinent constitutional restrictions.'" *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980) (quoting *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935)).

Constitutional concerns clearly guided the Court's decision in *Duro*. Throughout the opinion, the Court refers to the powers and limitations found in the Constitution. Reflecting on the earlier decision in *Wheeler*, the Court stated that "[h]ad the prosecution been a manifestation of external relations between the Tribe and outsiders, such power would have been inconsistent with the Tribe's dependent status, and could only have come to the Tribe by delegation from Congress, *subject to the constraints of the Constitution*." *Duro*, 495 U.S. at 686 (emphasis added). Clearly, the Court was acknowledging the constitutional limitations placed on Congress when delegating to tribes the power to prosecute non-member Indians.

The Court, in *Duro*, further recognized the personal liberty rights possessed by all Indians, stating that ". . . Indians like other citizens are embraced within our Nation's great solicitude that its citizens be protected . . . from unwarranted intrusion on their personal liberty." *Id.* at 692 (internal quotations omitted). This concept is derived directly from the Fifth Amendment of the Constitution. *See id.* Additionally, the Court's jurisprudence "suggest[s] constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right." *Id.* at 693. The constitutional concern at issue in *Duro* was

"an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system." *Id.* at 694. As a result of these constitutional concerns, the Court ultimately declined "to adopt a view of tribal sovereignty that would single out another group of citizens, non-member Indians, for trial by political bodies that do not include them," especially in light of the fact that the Bill of Rights does not apply to tribal governments. *Id.* at 693 (citing *Talton v. Mayes*, 163 U.S. 376 (1896)).

By recognizing that Indians are full citizens who "share in the territorial and political sovereignty of the United States," the Court understood the underlying danger in providing tribes with the inherent authority to criminally prosecute non-member Indians. *See id.* at 693. While acknowledging that tribal courts often resolve civil disputes involving non-members, including non-Indians, this Court found that "[t]he exercise of criminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe, and involves a far more direct intrusion on personal liberties." *Id.* at 688. Moreover, "[c]riminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States." *Id.* at 693. Therefore, if the Court's recognition of Indians as full United States citizens is to have any real meaning, the Court must act to protect the constitutional rights of Indians at least in the context of criminal proceedings by prohibiting successive, federally authorized tribal and federal prosecutions in violation of the Fifth Amendment's Double Jeopardy Clause.

In support of its view that *Duro* is not a constitutional decision, the government claims that history supports a finding that tribes exercised criminal jurisdiction over non-

member Indians even after ratification of the Constitution. (*See* Petitioner's Brief at 28.) This argument, however, ignores the fact that prior to 1924, Indians were not citizens of the United States and were not afforded the protections of the Constitution. *See Duro*, 495 U.S. at 692 (citing Felix Cohen, *Handbook of Federal Indian Law*, 142-43 (1982)); Pub. L. No. 68-175, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b) (affording citizenship to "person[s] born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe"). The government's argument also ignores the specific holdings of the Court in *Duro* that the historical evidence "on balance supports the view that inherent tribal jurisdiction extends to tribe members only," 495 U.S. at 691, and does not support the government's contention that tribes maintained prosecutorial power over non-members.

Although the government attempts to cloud the issue by citing treaties and congressional testimony (*see* Petitioner's Brief at 28-31), Respondent declines to engage in a historical battle over the bounds of inherent tribal sovereignty. Clearly, Congress cannot, as the government contends, "restore" inherent sovereignty. By its very nature, inherent tribal sovereignty existed long before European colonists descended upon North America. As the Court found in *Duro*, any inherent sovereignty the tribes may have had regarding prosecution of non-member Indians was surrendered when the tribes submitted themselves to the overriding authority of the United States. *See* 495 U.S. at 688. Congress cannot restore something that the tribes lost—Congress's plenary authority over Indians does not extend this far. *See Bourland*, 508 U.S. at 695 n. 15.

The Constitution's boundaries respecting the sovereignty of the federal government, the states, and Indian tribes cannot be altered or redefined by Congress. Under our Constitution, the respective boundaries of sovereignty are what they are.

Thus, under the Constitution, states may not make treaties with foreign nations, as this attribute of sovereignty was surrendered by the states under the Constitution. Just as Congress may not return to the states attributes of sovereignty taken away by the Constitution, neither may Congress purport to return to Indian tribes those attributes of sovereignty the Constitution itself removed from the tribes.

This Court already decided the question of tribal sovereign power in *Duro* after a careful and informed analysis of the relevant evidence and ruled that inherent tribal sovereignty does not extend to criminal prosecutions of non-member Indians. *See* 495 U.S. at 692. The Court need not address these factual disputes again in reaching a decision in the present matter.

Adopting the government's position that tribes always have had the inherent authority to prosecute non-member Indians would require the Court to explicitly overrule its prior decision in *Duro*. At the heart of *Duro* is the principle that a criminal defendant cannot be prosecuted in a tribunal that denies basic constitutional safeguards. It is difficult to imagine a decision more grounded in the Constitution than a decision from this Court protecting basic constitutional rights. Because the Court's decision in *Duro* is a constitutional ruling, Congress does not possess the power to legislatively reverse that decision. *See City of Bourne v. Flores*, 521 U.S. 507, 529 (1997); *Marbury*, 5 U.S. (1 Cranch) at 177.

B. Even If *Duro* Is Not A Constitutional Decision, Every Congressional Action Is Subject To Constitutional Review.

If the Court determines that its decision in *Duro* was not based on the Constitution, it would not give Congress the unlimited authority to legislatively replace the Court's holding. Through Congress's enumerated power found in the Indian Commerce Clause, the Constitution grants Congress

the authority to regulate the activity of Indian tribes.[5] U.S. Const. Art I, § 8, cl. 3. As this Court has often stated, Congress's power over Indians is plenary. *See Negonsott v. Samuels*, 507 U.S. 99, 103 (1993); *Santa Clara Pueblo*, 436 U.S. at 56; *Wheeler*, 435 U.S. at 327. Moreover, as the government and amici frequently point out, in *Duro* this Court recognized that Congress "has the ultimate authority over Indian affairs." *Duro*, 495 U.S. at 698.

However, even with such recognition, the Court noted that congressional actions pursuant to these enumerated powers are "*subject to the constraints of the Constitution.*" *Id.* at 686 (emphasis added). As the Court has stated, "[t]he power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946) (plurality opinion) (holding Congress's plenary power does not "enable the United States to give the tribal lands away to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them"); *see also Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1889) (providing that "Congress possesses plenary power of legislation in regard to [Indian tribes], subject only to the Constitution of the United States, [and] the validity of remedial legislation of this sort cannot be questioned unless in violation of some prohibition of that instrument").

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[5] The government and amici liken this "power" to Congress's "paramount authority" to review federal common law. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)). However, federal common law is a judge-made tool used to protect federal interests where Congress has not spoken. *See id.* at 313 (citing *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)). Should this Court determine that *Duro* was not a constitutional ruling, it would not necessarily follow that *Duro* was a federal common law case. Although the government states that Congress has the authority to alter federal common law decisions, such a blanket statement fails to address the unique situation presented in this case.

Congress's powers are limited to those enumerated powers found in the Constitution. *See* U.S. Const. Art. X; *City of Bourne*, 521 U.S. at 529. The Court has explicitly recognized that although Congress's authority extends to authorize legislation in the areas of Indian affairs, this authority is necessarily tempered by the Constitution and the Court's interpretations of it. *See Duro*, 495 U.S. at 686; *Alcea Band of Tillamooks*, 329 U.S. at 54. For example, it is axiomatic that Congress can regulate commerce between the states. *See United States v. Lopez*, 514 U.S. 549, 558 (1995); U.S. Const. Art I, § 8, cl. 3. However, any such regulation is subject to judicial review to ensure that such regulations pass constitutional muster. *Lopez*, 514 U.S. at 566 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Marbury*, 5 U.S. (1 Cranch) at 177). As such, Congress's regulatory power, when exercised pursuant to the Commerce Clause, the Indian Commerce Clause, or any other enumerated power, can never be, as the government alludes in its brief, unfettered and unchecked. The federal judiciary, and ultimately this Court, bear the supreme responsibility to say what the law is.

Having demonstrated that Congress's plenary powers are limited by the Constitution, Congress's enactment of 25 U.S.C. § 1301(2) violates the rights of U.S. citizens. Respondent is unquestionably a full citizen of the United States and, as a full citizen, Respondent is entitled to all the protections afforded by the Constitution.[6] *See Duro*, 495 U.S.

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[6] As the Court forcefully stated in *Duro*, "[w]hatever might be said of the historical record, we must view it in light of petitioner's status as a citizen of the United States." *Duro*, 495 U.S. at 692. By so doing, the Court signaled its position regarding the individual versus the tribe. Although the Court's prior rulings recognize Indians as polity rather than individuals, *see United States v. Antelope*, 430 U.S. 641 (1977), and *Morton v. Mancari*, 417 U.S. 535 (1974), the Court in *Duro* examined the issue in the reverse. In *Duro*, the Court correctly ruled that the application of tribal criminal jurisdiction constituted "an unwarranted intrusion into

at 692. Congress cannot subject United States citizens to "criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right." *Id.* (citing *Reid v. Covert*, 354 U.S. 1 (1957)). As the Court pointed out in *Duro*, and the government reluctantly recognizes, ICRA does not guarantee all of the protections found in the Bill of Rights, including an indigent's right to counsel. *See* 495 U.S. at 693; Petitioner's Brief, at 39. By subjecting Respondent to the criminal jurisdiction of the Spirit Lake Tribal Court, Congress has improperly permitted a dilution of Respondent's constitutional rights.[7] In amending ICRA, Congress overstepped its constitutional grant of authority to regulate the activity of Indian tribes.[8] This Court, empowered to enforce the rights guaranteed by the Constitution, should exercise this power and determine that Congress's enactment

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their personal liberty." 495 U.S. at 692 (quoting *Oliphant*, 435 U.S. at 210). Implicit in this holding is that Albert Duro's personal liberties are superior to the tribe's interests in extending its criminal jurisdiction over him and denying him those same liberties.

[7] Under the Sixth Amendment, Respondent would be entitled to a court-appointed lawyer in federal or state court. *See* U.S. Const. Amend VI; *Argersinger v. Hamlin*, 407 U.S. 25, 36-37 (1972).

[8] Under the 1991 amendments, non-member Indians will be subject to the "laws and mores" of what potentially could be a tribe with vastly different "tribal customs and traditions." *See Wheeler*, 435 U.S. at 331. For example, imagine a member of the Yakatuk tribe located in Alaska, arrested for an offense committed on the Seminole reservation in Florida and subjected to the laws and mores of a culture vastly different than her or his own. This is the impact of Congress's decision to overrule the Court's holding in *Duro*. As the Court held in *Duro*, "the tribes are not mere fungible groups of homogeneous persons among whom any Indian would feel at home. On the contrary, wide variations in customs, art, language, and physical characteristics separate the tribes, and their history has been marked by both intertribal alliances and animosities." 495 U.S. at 695 (citations omitted). By recognizing these differences, the Court signaled to Congress that any legislative response to *Duro* must comply with the protections found in the Constitution.

results in a violation of Respondent's constitutional rights, and the rights of all other non-member Indians.[9]

III. RESPONDENT'S FEDERAL PROSECUTION VIOLATED THE FIFTH AMENDMENT'S DOUBLE JEOPARDY CLAUSE AND SHOULD NOT STAND.

A. The Delegation Of Congressional Authority To Prosecute Non-Member Indians Was Proper.

The court of appeals determined that it need not void Congress's 1991 ICRA amendments because although Congress could not overrule the Court's decision in *Duro*, it could delegate federal authority to the tribe. *See Lara*, 324 F.3d at 640. The government and amici claim that the court of appeals failed to consider Congress's intent and improperly interpreted the 1991 amendments as a delegation of federal authority. Respondent contends otherwise.

As the government, the *amici*, and the concurring opinion in *Hicks* contend, Congress wanted to ensure that tribes had the power to prosecute non-member Indians in tribal courts. The Court in *Duro* recognized that its decision possibly created a jurisdictional void. *See* 495 U.S. at 696. The "Duro-fix" legislation was meant, first and foremost, to close that void. This intent need not be ignored, and Congress's amendments need not be considered a nullity. The fact that Congress mistakenly believed it could "restore" tribal inherent sovereignty merely demonstrates Congress's misunderstanding of the nature and extent of tribal sovereign power and this Court's role in defining the limits of that

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[9] Congress's enactment of 25 U.S.C. § 1301(2) violates the rights of all Indians. But such violations are permissible by a tribal court prosecuting a tribal member. *See Duro*, 495 U.S. at 694. By choosing to enroll in a tribe, the tribal member consents to both the benefits and burdens imposed by tribal membership. *See id.*

power. Congress cannot restore those principles of inherent sovereignty which were necessarily lost by the tribe's submission to overriding federal authority. The *Constitution*, not Congress, divested the Indian tribes of inherent authority to try non-member Indians. Congress may, as it did here, invest Indian tribes with authority to try non-members by a delegation of its authority, just as Congress may invest the District of Columbia with authority to try criminal offense. *See, e.g., United States v. Mills*, 964 F.2d 1186, 1193 (D.C. Cir. 1992) (en banc). What Congress cannot do, however, is return attributes of sovereignty to the Indian tribes that the Constitution itself removed. Thus, if Congress delegates authority to the tribe, that delegation is subject to the strictures of the Double Jeopardy Clause.

It does not lesson Congress's desire to maintain and defend order on the reservations. It appears that Congress believed it could "restore" tribal sovereignty and overrule the Court's holding in *Duro*. As explained above, it could do neither. However, as the court of appeals correctly held, Congress's actions can be viewed as a delegation of federal authority to the tribes, thus ensuring that the spirit of Congress's intent is followed. Respondent respectfully submits that the lower court's conclusion was correct, and its decision should be affirmed.[10]

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[10] Respondent recognizes that if Congress's amendments delegated federal authority to prosecute non-member Indians to the tribes, it is possible that Fifth Amendment Due Process concerns may exist. However, whether the delegation violates the Fifth Amendment's Due Process Clause is not currently before the Court in this case. Here, the question is much more simple: did Congress delegate federal authority to the tribal courts to prosecute non-member Indians? Respondent contends the answer to this question is yes, and thus, his subsequent federal prosecution violates the Double Jeopardy Clause. As the Court stated in *Duro*, it is Congress's job to determine the extent of tribal jurisdiction, *subject to the Constitution*. *See Duro*, 495 U.S. at 686 (emphasis added). The Court need not resolve any potential Due Process implications created by a federal delegation in this case. Rather, the Court can instruct Congress, as the Court did in *Duro*, to remedy these problems such that they pass constitutional muster. Congress has already provided such a mechanism by permitting states to assume jurisdiction over crimes in Indian country. *See* Pub. L. No. 280, Act of Aug. 15, 1953, Ch. 505, 67 Stat. 588 (codified, as amended, at 18 U.S.C. § 1162, 28 U.S.C. § 1360). Moreover, neighboring tribes can engage in reciprocal agreements which permit concurrent jurisdiction over each tribe's members. *See Duro*, 495 U.S. at 697.

B. Jeopardy Attached To Respondent's Tribal Court Prosecution And His Subsequent Federal Prosecution Is Double Jeopardy.

The government contends that if Congress's attempt to "restore" inherent tribal sovereignty to the Spirit Lake Sioux Tribe was impermissible, then the tribe was without jurisdiction to prosecute Respondent. As such, the government argues that because the tribal court never possessed the power to prosecute Respondent, jeopardy never attached and Respondent's subsequent federal prosecution does not violate double jeopardy. (*See* Petitioner's Brief at 43.)

Contrary to the government's position, Respondent was placed in jeopardy during his tribal prosecution, thus precluding the subsequent federal prosecution.[11] First, Respondent appeared before the Spirit Lake Reservation tribal court pursuant to 25 U.S.C. § 1301(2), the statute unquestionably in effect at the time of Respondent's arrest. Second, Respondent pleaded guilty to the misdemeanor assault charge in the tribal court. When a criminal defendant pleads guilty and the court accepts the plea, jeopardy attaches. *See, e.g., United States v. Smith*, 912 F.2d 322, 323-24 (9th Cir. 1990); 5

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[11] In the Brief of *Amicus Curiae* of the States of Idaho, Alabama, Louisiana, Nebraska, South Dakota and Utah, the *amici* contend that the double jeopardy question is unreachable by this Court because Congress's 1991 ICRA amendments cannot be construed as a delegation. (Brief of *Amicus Curiae* State of Idaho, *et al.*, at 12-17.) This argument, however, ignores the fact that jeopardy attached in Respondent's tribal prosecution.

Wayne R. LaFave, *et al*, *Criminal Procedure*, §25.1(d) (2d ed. 1999). Third, Respondent served more than seventy days of his tribal sentence before federal prosecutors indicted Respondent for assaulting the tribal/BIA officer. The entire length of Respondent's ninety-day sentence has now been served. If jeopardy attaches when a criminal defendant pleads guilty and the court accepts the plea, jeopardy most certainly attaches when that same defendant has been sentenced and incarcerated pursuant to that plea. Respondent, by pleading guilty, receiving a sentence, and serving that sentence, was placed in jeopardy for purposes of the Fifth Amendment's Double Jeopardy Clause.

The government cites *Serfrass v. United States*, 420 U.S. 377 (1975), *Grafton v. United States*, 206 U.S. 333 (1907), *United States v. Ball*, 163 U.S. 662 (1896), *Kepner v. United States*, 195 U.S. 100, 129 (1904), and *United States v. Phelps*, 168 F.3d 1048 (8th Cir. 1999), for the proposition that an individual cannot be placed in jeopardy if prosecuted by a court that had no prosecutorial jurisdiction over the individual. (*See* Petitioner's Brief at 43.) These cases are either distinguishable or supportive of Respondent's position.

First, the defendant in *Serfrass* based his double jeopardy claim on the dismissal of a previous indictment. *See* 420 U.S. at 389. Next, in *Ball*, the initial prosecution resulted in an acquittal, but it was later determined that the indictment charging the offense was defective. *See* 163 U.S. at 669-70. The Court determined that the subsequent prosecution on a proper indictment constituted double jeopardy, because notwithstanding the defective indictment, the court had jurisdiction over the person and the subject matter. *See id.* Similarly, in *Kepner*, the Court applied the holding from *Ball* and concluded that a statute permitting the State to appeal acquittals in criminal cases violated the double jeopardy clause. *See* 195 U.S. at 133-34. The decisions in *Ball* and *Kepner* support Respondent's argument because the Court

held that the subsequent prosecutions violated the Double Jeopardy Clause.

In *Phelps*, the tribal court prosecuted a non-Indian for an offense on the reservation, in violation of the long-standing principle issued in *Oliphant*, 435 U.S. at 205. *See Phelps*, 168 F.3d at 1054-55. The defendant asserted a double jeopardy claim in his subsequent federal prosecution, which the court of appeals rejected, stating that under the clear holding in *Oliphant*, the tribal court never possessed jurisdiction over the non-Indian defendant. *See id.* at 1054.

Each of these cases represent vastly different factual scenarios than the circumstances giving rise to Respondent's double jeopardy claim, a claim based on his charge, plea of guilty, and incarceration for one-quarter of one year. In the matter before the Court, the Spirit Lake tribal court prosecuted Respondent under the authority granted to it by Congress's 1991 amendments to ICRA. The court of appeals' holding in *Phelps* clearly differs in that the tribal court's prosecution violated this Court's twenty-year-old precedent that had never been challenged by Congress or overruled by this Court.

Grafton v. United States further supports Respondent's position. In *Grafton*, the defendant was first tried and convicted by a military court martial in the Philippine Islands. *See* 206 U.S. at 341. Subsequently, a Philippine civilian court sought to try the defendant for the same offense. *See id.* at 342-43. At the time of this second prosecution, the Philippine civilian court operated pursuant to a congressional grant of authority. *See id.* at 351-52. The Court determined that the second prosecution violated the Double Jeopardy Clause because both the military court and Philippine court derived their authority from the same source—Congress. *See id.* at 352.

These are the precise circumstances in the matter currently before the Court. The Spirit Lake Tribal Court prosecuted Respondent pursuant to a congressional delegation of authority. At the time of Respondent's prosecution, the tribal court had no reason to doubt Congress's ability to confer such jurisdiction on it, nor did the tribal court have any need to question the validity of the IRCA amendments. Respondent's tribal prosecution was conducted pursuant to the law of the land, as it stood at that time.

If the Court determines that Congress acted beyond its authority in passing these amendments, it should have no practical effect on the validity of Respondent's tribal prosecution, guilty plea, and incarceration. In effect, the government requests that if this Court rules in Respondent's favor and invalidates the ICRA amendments, the Court should apply that ruling retroactively, rewrite history, and declare that Respondent's tribal prosecution, and more importantly, his incarceration, never occurred. Congress cannot rewrite history and cannot rewrite the logs of the Spirit Lake Tribal jail. No matter what is said of Respondent's contact with the tribal court, it cannot be disputed that Respondent *was* punished. The Double Jeopardy Clause prevents more than jeopardy. Its history, predating the United States Constitution, is to prevent dual *punishment* far more than dual investigations, charges and trials.

C. The Government's Remaining Policy-Based Arguments Are Either Irrelevant To The Protection Of Respondent's Constitutional Rights, Wrongly Presented, Or Both.

Perhaps recognizing the impact of the Court's statements in *Duro* that Indians should be afforded constitutional rights, the government contends that Respondent's tribal prosecution did not violate the due process rights guaranteed by the Fifth Amendment. (*See* Petitioner's Brief at 39.) The government states that "Congress could reasonably conclude that non-

member Indians' personal liberties are, as a general matter, adequately protected in a tribal prosecution—and that, in the event that some fundamental liberty is denied in a particular case, relief can be sought on federal habeas review." (*Id.*) The government further argues that ICRA provides some, but not all, of the rights guaranteed by the Constitution, and those rights not guaranteed (most notably the right to counsel) are not implicated in most tribal prosecutions.[12] (*Id.* at 39-40.)

By making this contention, the government ignores the specific admonition of the Court in *Duro*—Indians are full citizens of the United States. *See* 495 U.S. at 692. As full citizens, Indians' constitutional rights should not be subjected to dilution because they are Indians. The government notes that "24% of the Tribes then provided counsel for indigent defendants in tribal court, and that 46% provided either counsel or trained-lay advocates." (Petitioner's Brief at 40 (citing Impact of the Supreme Court's Ruling in *Duro v. Reina*: Hearing Before the Senate Select Comm. on Indian Affairs, 102d Cong., 1st Session. Pt. 2, at 218 (1991))). Apparently, the government considers it adequate that more than seventy percent of all Indians prosecuted in tribal court are not guaranteed the right to counsel. Although the Court

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[12] As the Court noted in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)

> That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

has deemed it constitutionally permissible to abrogate the rights of tribal members because of their consent to tribal authority, *see Duro*, 495 U.S. at 494, the same rationale cannot be applied to non-member Indians who did not consent to another tribe's authority.

The government's due process argument is also riddled with inconsistencies. First, the government contends that the federal government lacks the resources to prosecute misdemeanor crime on the reservations. (*See* Petitioner's Brief at 38) (citing S. Rep. No. 168, at 4 (stating that "U.S. Attorneys, already overburdened with the prosecution of major crimes, could not assume the caseload of criminal misdemeanors referred from tribal courts for prosecution of non-member Indians.")). However, just a few pages later, the government argues that in the event of an unconstitutional conviction, the non-member Indian can seek federal review via a habeas corpus petition.[13] (*See* Petitioner's Brief at 42.) The inconsistency of this argument is apparent on its face. In one instance, federal prosecutors are far too busy to deal with the direct prosecution of non-member Indians, but apparently they nevertheless have more than enough time and resources to defend these tribal prosecutions on federal habeas review. Burdens placed on the United States Department of Justice, this nation's largest law firm, are not sufficient grounds to justify the violation of a citizen's constitutional rights.

[13] The government claims that because few federal habeas corpus petitions are filed following tribal prosecutions, one can assume that tribal courts do not deny defendants their constitutional rights. (*See* Petitioner's Brief at 42.) This argument, however, fails to consider all potential factors at play. For example, the absence of habeas petitions from indigent defendants prosecuted in tribal court could be the result of the non-application of the right to counsel to tribal prosecutions. Simply put, the convicted defendant likely does not know what he/she is constitutionally entitled to claim, much less how to petition a U.S. district court for relief.

Moreover, the government's claim that federal prosecutors are overworked is not borne out by the statistics prepared by the United States Department of Justice. Since 1993, the total number of court-related attorney work hours has decreased from 1,285 to 930 hours per attorney. *See* 2002 U.S. Dept. of Justice Ann. Rep., U.S. Attorneys' Annual Statistical Rep. at 4. That is a decrease of more than 25% in ten years. Additionally, since 2000, that same number has plateaued, fluctuating between 927 hours in 2000, 916 hours in 2001, and 930 hours in 2002. *See id.* Coinciding with this decrease in attorney court time, the number of federal prosecutors has increased from 4,155 in 1993 to 5,304 in 2002. *See id.* at 3. As these statistics demonstrate, federal prosecutors have more, not less, time than in recent history.

The government argues that a tribal prosecution of an indigent who did not receive the benefit of counsel could be cured of any constitutional infirmity if the tribal prosecutor forgoes requests for incarceration. (*See* Petitioner's Brief at 41.) The government makes this argument while at the same time contending that the maximum tribal punishment available (one year incarceration and a $5,000 fine) is inadequate to preserve public safety on the reservations. (*See* Petitioner's Brief at 19.) In effect, the government is saying that public safety on the reservation compels the recognition of inherent tribal sovereignty to prosecute non-member Indians, but incarceration should be waived to prevent constitutional violations. Thus, the tribe can prosecute all non-member Indians, but they cannot incarcerate them when convicted for their crimes.

Next, the government's contention that if tribes are delegated federal prosecutorial power over non-member Indians, "[a] non-member Indian would have a great incentive to enter a prompt guilty plea in a tribal prosecution, thereby gaining protection from federal prosecution." (Petitioner's Brief at 21.) Although the government's concern is real, its impact is

within the government's control. Every state has at least one U.S. Attorney's office that necessarily must communicate with tribal prosecutors on reservations in that state. Although the government alleges that U.S. Attorneys are overworked, it can be argued that tribal prosecutors are just as busy, if not more busy than their federal counterparts. It would be a rare case where a tribal prosecutor would not defer to his or her colleagues at the U.S. Attorney's office to reduce his or her caseload and get a more appropriate sentence.

The government's contention also assumes that the criminal defendant is the only person involved in the decision to charge an offense or plead guilty. A defendant cannot force a tribal prosecutor to charge him. A defendant cannot plead guilty to an offense without the prosecutor's knowledge. Both the tribal prosecutor and the tribal court must be involved in any guilty plea. The tribal court must accept the guilty plea and it can be assumed that if the tribal judge questions the appropriateness of a misdemeanor charge, the prosecutor will be asked if the U.S. Attorney has had appropriate input on the case. The government's concern on this point would require a breakdown of the system between the tribal prosecutor, the tribal court, and the U.S. Attorney.

There is no contention that tribal prosecutors care less about law enforcement than U.S. Attorneys. There is no contention that these tribal prosecutors are corrupt or relish the opportunity to allow murderers to plead guilty to tribal assault charges to avoid a federal murder prosecution. As a practical matter, this Court's affirmance of *Duro* would increase communication and cooperation between tribal and federal prosecutors. This would result in a better use of resources and likely lead to more efficient prosecutions in tribal courts and ensure greater safety on the Indian reservations.

CONCLUSION

For the reasons stated above, Respondent, Billy Jo Lara, respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY JO LARA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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12 pp

TABLE OF CONTENTS

		Page
A.	Nothing in the Constitution or in this Court's *Duro* decision precludes Congress from restoring the Tribes' sovereign power to prosecute members of other Tribes	2
B.	Congress's post-*Duro* amendment to Section 1301(2) can be understood only as a restoration of a tribal power, and not as a delegation of a federal power	5
C.	The circuit conflict over Congress's ability to restore the Tribes' power to prosecute non-member Indians warrants the Court's resolution in this case	6
D.	This case presents important questions about the scope of Congress's plenary power over Indians and Indian Tribes—and, in particular, over criminal law enforcement in Indian Country	7

TABLE OF AUTHORITIES

Cases:

Argersinger v. *Hamlin*, 407 U.S. 25 (1972)	4
Duro v. *Reina*, 495 U.S. 676 (1990)	1, 3, 6
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978)	3
United States v. *Enas*, 255 F.3d 662 (9th Cir. 2001), cert. denied, 534 U.S. 1115 (2002)	2
United States v. *Wheeler*, 435 U.S. 313 (1978)	3, 6

Constitution and statutes:

U.S. Const.:	
Amend. IV	4
Amend. V (Double Jeopardy Clause)	2, 4
Amend. VI	4
Amend. VIII	4

Statutes—Continued:	Page
Indian Civil Rights Act, 25 U.S.C. 1301 *et seq.*:	
25 U.S.C. 1301(2)	1, 2, 4, 5, 7
25 U.S.C. 1302	4
25 U.S.C. 1303	4
Miscellaneous:	
67 Fed. Reg. 46,328 (2002)	7
H.R. Conf. Rep. No. 261, 102d Cong., 1st Sess. (1991)	6
H.R. Rep. No. 61, 102d Cong., 1st Sess. (1991)	5
S. Rep. No. 168, 102d Cong., 1st Sess. (1991)	5-6

In the Supreme Court of the United States

No. 03-107

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY JO LARA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The United States seeks this Court's review to resolve a circuit conflict over whether 25 U.S.C. 1301(2) restores to Indian Tribes a sovereign power that they were held to have lost in *Duro* v. *Reina*, 495 U.S. 676 (1990)—namely, a Tribe's power to prosecute Indians who are members of other Tribes for offenses committed on its reservation. In this case, the Eighth Circuit, sitting en banc, held that *Duro*'s delineation of the scope of the Tribes' retained sovereign powers is constitutional in character, so that Congress cannot restore the Tribes' sovereign power to prosecute nonmember Indians or remove an impediment to its exercise. Pet. App. 8a. Then, to avoid rendering Congress's post-*Duro* amendment to Section 1301(2) "a legal nullity" (*id.* at 10a), the court interpreted it as vesting federal prosecutorial power to the Tribes. As a conse-

quence, the court held that, once a Tribe exercises the authority recognized in Section 1301(2) to prosecute a non-member Indian, a federal prosecution is barred by the Double Jeopardy Clause of the Fifth Amendment. *Id.* at 11a. In contrast, the Ninth Circuit, also sitting en banc, held that *Duro* rests on the common law, not on the Constitution, so that Congress could, and did in Section 1301(2), restore to the Tribes their sovereign power to prosecute non-member Indians. *United States* v. *Enas*, 255 F.3d 662 (9th Cir. 2001) (en banc), cert. denied, 534 U.S. 1115 (2002).

Respondent does not dispute that the Eighth and Ninth Circuits are in irreconcilable conflict over whether Section 1301(2), as amended after *Duro*, is a valid restoration of tribal sovereign power. Nor does respondent identify any reason why this is not an appropriate case in which to resolve the conflict definitively. Although respondent argues that the decision below is correct on the merits, that would be no reason, even if true, to withhold review. In any event, respondent's defense of the decision below is unavailing, as is his attempt to diminish its significance for effective law enforcement in Indian Country.

A. Nothing In The Constitution Or In This Court's *Duro* Decision Precludes Congress From Restoring The Tribes' Sovereign Power To Prosecute Members Of Other Tribes

On the merits, respondent contends that "*Duro* is a constitutional case," so that Congress cannot restore to Tribes the sovereign power at issue in that case. Br. in Opp. 5. Respondent does not, and cannot, point to any provision of the Constitution that speaks to which sovereign powers Tribes may continue to exercise after their incorporation into the United States. Nor does

Duro itself identify any constitutional provision that might have such effect. Respondent points instead to *Duro*'s references to provisions of the Constitution, such as those in the Bill of Rights, that protect citizens against "unwarranted intrusions on their personal liberty." *Ibid.* (quoting *Duro*, 495 U.S. at 692, and *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 210 (1998)).

Respondent misunderstands the context in which the Court invoked those constitutional provisions in *Duro*. It did so not to suggest that *Congress* could not recognize a tribal sovereign power to prosecute members of other Tribes—a question that was not presented in *Duro*—but rather to suggest that the *Court* itself should "hesitate" to do so in the absence of action by Congress. 495 U.S. at 693. The Court sought to distinguish its earlier holding in *United States* v. *Wheeler*, 435 U.S. 313 (1978), that Tribes retain the inherent power to prosecute their own members, reasoning that only a Tribe's members can be viewed as having consented to prosecution in its courts, where they would not be guaranteed all of the federal constitutional protections to which citizens are entitled. 495 U.S. at 693-694. At the same time, however, the Court recognized that the fact "[t]hat Indians are citizens does not alter the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits." *Id.* at 692. The Court added that its consideration of non-member Indians' constitutional rights as citizens was undertaken "[i]n the absence of such legislation."

Ibid. Nothing in *Duro* thus precludes Congress, as a constitutional matter, from enacting legislation of the sort at issue here.

A tribal prosecution of a non-member Indian under the amended Section 1301(2) often does not present the concerns identified in the portion of *Duro* on which respondent relies. In most respects, the rights guaranteed criminal defendants in tribal court by the Indian Civil Rights Act are analogous to the rights guaranteed criminal defendants in federal and state court by the Constitution. The Indian Civil Rights Act includes most of the specific protections of the Fourth, Fifth, Sixth, and Eighth Amendments, as well as more general protections against denial of equal protection of tribal law and against deprivation of liberty or property without due process of law. See 25 U.S.C. 1302. Although some rights provided by the Constitution, such as the right to appointed counsel before imprisonment may be imposed even for a misdemeanor offense, are not provided by the Indian Civil Rights Act, many tribal prosecutions do not implicate those rights or are conducted consistently with them. (A tribal court may appoint counsel for an indigent defendant, for example, or may require the prosecutor to forgo seeking incarceration. See *Argersinger* v. *Hamlin*, 407 U.S. 25, 40 (1972).). In other cases, a defendant who claims to have been denied a right to which he is entitled under the Constitution may seek relief in the tribal court itself or, if convicted, from federal district court on habeas review under 25 U.S.C. 1303. The mere possibility that a particular non-member Indian might not be afforded identical rights in tribal court as in federal and state

court should not, therefore, call into question Congress's power to authorize Tribes to exercise criminal jurisdiction over such persons.

Here, respondent did not raise any claim in his tribal prosecution of the denial of any federal constitutional right. Although respondent now asserts that his "individual rights * * * are implicated by his prosecution by a sovereign which does not afford him his constitutional rights" (Br. in Opp. 6), he does not identify any particular right that was denied him or otherwise challenge the validity of his tribal prosecution. It is respondent's *federal* prosecution, not his *tribal* prosecution, to which his constitutional challenge is directed.

B. Congress's Post-*Duro* Amendment To Section 1301(2) Can Be Understood Only As A Restoration Of A Tribal Power, And Not As A Delegation Of A Federal Power

Respondent contends that the Eighth Circuit correctly interpreted the post-*Duro* amendment to Section 1301(2) as vesting federal prosecutorial power in the Tribes. Br. in Opp. 8-9. Respondent makes no attempt to reconcile that interpretation of the amendment with its text and legislative history.

The amendment, by its terms, "recognize[s] and affirm[s]" that the Tribes' "powers of self government" include "the inherent power * * * to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). That language can be understood only as a restoration of that aspect of tribal sovereignty; the terms "inherent power" and "power[] of self government" denote power exercised by the Tribes as sovereigns. The House Committee Report confirms that the amendment "is not a federal delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations." H.R. Rep. No. 61. 102d Cong., 1st Sess. 7

(1991); see S. Rep. No. 168, 102d Cong., 1st Sess 4 (1991) (describing amendment as "recogniz[ing] and reaffirm[ing] the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians"); H.R. Conf. Rep. No. 261, 102d Cong., 1st Sess. 3 (1991) (similar).

Nor is there any reason to suppose that Congress would have countenanced the vesting of federal prosecutorial power in the Tribes. Congress would not have wanted to bar the United States, acting through the Attorney General and the United States Attorneys, from prosecuting federal offenses committed by non-member Indians—including major felonies carrying substantial penalties—whenever the defendant had been prosecuted by a Tribe for an offense that contained the same elements but that necessarily carried only misdemeanor penalties.

C. The Circuit Conflict Over Congress's Ability To Restore The Tribes' Power To Prosecute Non-Member Indians Warrants The Court's Resolution In This Case

Respondent suggests that the Court should defer addressing the question presented by the petition until the circuit conflict has deepened. Br. in Opp. 9-10. There is no merit to that suggestion. This Court granted certiorari in *Duro* and *Wheeler* to resolve conflicts that likewise involved the Eighth and Ninth Circuits alone. See *Duro*, 495 U.S. at 684; *Wheeler*, 435 U.S. at 316 & n.6. Here, because the Eighth and Ninth Circuits both reviewed the question en banc, 22 appellate judges have had the opportunity to consider it, thereby assuring that the arguments on both sides have been fully explored. Those two Circuits, moreover, contain more than 80% of the recognized Tribes in

the United States,[1] thereby making prompt resolution of the conflict particularly appropriate. Although respondent also suggests that "[a]ction by Congress may make any decision on this case moot" (Br. in Opp. 10), the United States is aware of no pending legislation involving the Tribes' authority to prosecute non-member Indians, and respondent does not identify any such legislation.

D. This Case Presents Important Questions About The Scope Of Congress's Plenary Power Over Indians And Indian Tribes—And, In Particular, Over Criminal Law Enforcement In Indian Country

Respondent asserts that the question presented in this case is not of sufficient importance to be considered by this Court. Br. in Opp. 10-12. Respondent is mistaken.

Here, the Eighth Circuit held that the post-*Duro* amendment to Section 1301(2) would be constitutionally invalid as a restoration of a tribal sovereign power, and preserved the amendment only by interpreting it, contrary to its text and legislative history, as a grant of federal power. The scope of Congress's power in this area is important in its own right. In addition, the Court's grants of certiorari in *Duro*, *Wheeler*, and *Oliphant*, reflect the significance of questions concerning the extent of the Tribes' power to prosecute crimes committed on their reservations.

As explained in the petition (at 20-22), the question presented here also has significant ramifications for law enforcement in Indian Country, which operates most

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[1] According to information provided to this Office by the Bureau of Indian Affairs, of the 562 recognized Tribes in the United States (see 67 Fed. Reg. 46,328 (2002)), 455 are located in the Eighth and Ninth Circuits.

effectively when both the United States and a Tribe may prosecute a non-member Indian for conduct that violates their respective criminal laws. Prosecution by the United States assures that federal interests can be vindicated—such as the interest here in prosecuting respondent's acknowledged assault on a federal officer—and that penalties commensurate with the severity of the offense can be imposed. Prosecution by the Tribe prevents non-member Indians from avoiding justice altogether for misdemeanor-type offenses—which the United States or a State may lack the legal authority or resources to prosecute—and permits the vindication of distinct tribal interests in the security of the reservation community. Although, as respondent notes (Br. in Opp. 12), some of the adverse effects of the Eighth Circuit's decision may be avoided by cooperation between the United States and the Tribes, cooperation imposes additional burdens on federal and tribal prosecutors, and cannot be assured of occurring effectively in each and every case.[2]

* * * * *

[2] Respondent observes that, in addition to a double jeopardy challenge to his federal prosecution, he also raised a selective prosecution challenge. Br. in Opp. 1. The vacated panel opinion correctly rejected respondent's selective prosecution claim (Pet. App. 28a), and the en banc court did not address it. Although respondent invites this Court to consider the claim (Br. in Opp. 1), the claim is not in a suitable posture for the Court's review, since there is no operative ruling of the court of appeals on the claim. If this Court grants certiorari in this case and reverses the judgment of the Eighth Circuit on the double jeopardy claim, the court of appeals will have the opportunity to consider the selective prosecution claim on remand.

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

SEPTEMBER 2003

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No. 03-107

In the Supreme Court of the United States

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ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

In *Duro* v. *Reina*, 495 U.S. 676 (1990), this Court held that Indian Tribes had lost their inherent sovereign power to prosecute members of other Tribes for offenses committed on their reservations. Congress responded to the Court's decision by amending the Indian Civil Rights Act of 1968, 25 U.S.C. 1301, to "recognize[] and affirm[]" the "inherent power" of Tribes to "exercise criminal jurisdiction over all Indians." The question presented is:

Whether Section 1301, as amended, validly restores the Tribes' sovereign power to prosecute members of other Tribes (rather than delegates federal prosecutorial power to the Tribes), such that a federal prosecution following a tribal prosecution for offenses with the same elements is valid under the Double Jeopardy Clause of the Fifth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
Summary of argument	11
Argument:	
The United States is not barred by the Double Jeopardy Clause of the Fifth Amendment from prosecuting respondent for a federal offense that contains the same elements as the tribal offense for which he was previously prosecuted	14
I. The Double Jeopardy Clause permits the United States and an Indian Tribe, as separate sovereigns, to prosecute a non-member Indian for crimes that contain the same elements	14
A. The Double Jeopardy Clause has no application to prosecutions by separate sovereigns	14
B. The post-*Duro* amendment to the Indian Civil Rights Act can only be understood as a restoration of Tribes' sovereign power to prosecute violations of their laws by members of other Tribes	17
1. The text of amended Section 1301(2) speaks of restoring a tribal sovereign power	18
2. The legislative history of amended Section 1301(2) reflects Congress's intent to restore a tribal sovereign power	18

TABLE OF CONTENTS—Continued: Page

3. Congress's purpose to combact crime by non-member Indians demonstrates that amended Section 1301(2) was designed to restore tribal sovereign power 19
4. Principles of constitutional avoidance do not justify construing amended Section 1301(2) as a delegation of federal power 21

C. Congress has constitutional authority to restore aspects of sovereignty lost by Tribes by virtue of their dependent status, including the sovereign power to prosecute non-member Indians 22
1. Congress's plenary authority over Tribes permits the restoration of the tribal sovereign power to prosecute non-member Indians 23
2. *Duro* does not suggest that the scope of tribal criminal jurisdiction is fixed in the Constitution and cannot be altered by Congress 26
3. Congress has been recognized to have the authority in other contexts to remove impediments to the exercise of sovereign power without delegating federal power 32

D. Congress's recognition of the tribal sovereign power to prosecute non-member Indians does not violate the Due Process Clause of the Fifth Amendment 34

TABLE OF CONTENTS—Continued: Page

1. Congress may legislate distinct rules governing Tribes and tribal members, and Congress validly did so in amended Section 1301(2) 35
2. Tribal prosecution of non-member Indians under amended Section 1301(2) does not infringe due process rights 39

II. The Double Jeopardy Clause would not bar the United States from prosecuting respondent, even if Congress could not constitutionally restore the Tribe's power to prosecute him 43

Conclusion 45
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Abney v. *United States*, 431 U.S. 651 (1977) 8
Alaska v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1988) 22
Aptheker v. *Secretary of State*, 378 U.S. 500 (1964) 22
Argersinger v. *Hamlin*, 407 U.S. 25 (1972) 41
Board of County Comm'rs v. *Seber*, 318 U.S. 705 (1943) 23
Brendale v. *Confederated Yakima Indian Nation*, 492 U.S. 408 (1989) 24
Cherokee Nation v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831) 27
Commodity Futures Trading Comm'n v. *Schor*, 478 U.S. 833 (1986) 22
Duro v. *Reina*, 495 U.S. 676 (1990) ..... *passim*
Fisher v. *District Court*, 424 U.S. 382 (1976) 35, 36
Foley v. *Connelie*, 435 U.S. 291 (1978) 40

Cases—Continued: Page

Frontiero v. *Richardson*, 411 U.S. 677 (1973) 35
George Moore Ice Cream Co. v. *Rose*, 289 U.S. 373 (1933) 22
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 41
Grafton v. *United States*, 206 U.S. 333 (1907) 13, 43
Heath v. *Alabama*, 474 U.S. 82 (1985) 15, 18
Heckler v. *Mathews*, 465 U.S. 728 (1984) 22
Hillside Dairy Inc. v. *Lyons*, 123 S. Ct. 2142 (2003) 32
Kepner v. *United States*, 195 U.S. 100 (1904) 43-44
Lake Country Estates, Inc. v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979) 33
Moe v. *Salish & Kootenai Tribes*, 425 U.S. 463 (1976) 35
Montana v. *United States*, 450 U.S. 544 (1981) 24, 25
Morton v. *Mancari*, 417 U.S. 535 (1974) 23, 35
Negonsott v. *Samuels*, 507 U.S. 99 (1993) 3, 4, 22
Nevada v. *Hicks*, 533 U.S. 353 (2001) 24
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978) 3, 5, 16, 17, 27, 28, 39
Pero, Ex parte, 99 F.2d 28 (7th Cir. 1938), cert. denied, 306 U.S. 643 (1939) 6
Prudential Ins. Co. v. *Benjamin*, 328 U.S. 408 (1946) 32
Puerto Rico v. *Shell Co.*, 302 U.S. 253 (1937) 15
Rutledge v. *United States*, 517 U.S. 292 (1996) 20
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978) 22, 23
Serfass v. *United States*, 420 U.S. 377 (1975) 43
South Dakota v. *Bourland*, 508 U.S. 679 (1993) 24, 26
State v. *Hook*, 476 N.W.2d 565 (N.D. 1991) 5
State v. *Marek*, 736 P.2d 1314 (Idaho 1987) 33
Sugarman v. *Dougall*, 413 U.S. 634 (1973) 40
Three Affiliated Tribes of the Fort Berthold Reservation v. *Wold Eng'g*, 476 U.S. 877 (1986) 23-24
United States v. *Antelope*, 430 U.S. 641 (1977) 6, 35, 36

Cases—Continued: Page

United States v. *Ball*, 163 U.S. 662 (1896) 44
United States v. *Enas*, 255 F.3d 662 (9th Cir. 2001), cert. denied, 534 U.S. 1115 (2002) 2
United States v. *Kagama*, 118 U.S. 375 (1886) 4, 16, 23
United States v. *Lanza*, 260 U.S. 377 (1922) 15
United States v. *Long*, 324 F.3d 475 (7th Cir. 2003), cert. denied, No. 02-1801 (Oct. 6, 2003) 26
United States v. *Mazurie*, 419 U.S. 544 (1975) 24, 25, 43
United States v. *McBratney*, 104 U.S. 621 (1882) 4
United States v. *Phelps*, 168 F.3d 1048 (8th Cir. 1999) 44
United States v. *Sandoval*, 231 U.S. 28 (1913) 23
United States v. *Wheeler*, 435 U.S. 313 (1978) 5, 7, 11, 15, 16, 21, 24, 28
Waller v. *Florida*, 397 U.S. 387 (1970) 15
Washington v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) 35
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Yu Cong Eng v. *Trinidad*, 271 U.S. 500 (1926) 22

Constitution, treaties, statutes and regulation:

U.S. Const.:
Art. I:
§ 8 33
§ 8, Cl. 3 (Commerce Clause) 23, 32
§ 10, Cl. 3 (Interstate Compact Clause) 33
Art. II, § 2, Cl. 2 23
Amend. IV 39
Amend. V 2, 14, 39
Double Jeopardy Clause ..... *passim*
Due Process Clause 34
Amend. VI 39
Amend. VIII 39

Treaties, statutes and regulation—Continued: Page

Treaty with the Cherokee, Nov. 28, 1785, Art. V, 7 Stat. 18 29
Treaty with the Cherokee, Aug. 7, 1790, Art. VIII, 7 Stat. 39 28-29
Treaty with the Chickasaw, Jan. 10, 1786, Art. IV, 7 Stat. 24 29
Treaty with the Choctaw, Jan. 3, 1786, Art. IV, 7 Stat. 21 29
Treaty with the Creeks, Aug. 7, 1790, Art. VI, 7 Stat. 35 29
Treaty with the Wyandot, Jan. 21, 1785, Art. V, 7 Stat. 16 29
Act of May 31, 1946, ch. 279, 60 Stat. 229 5
Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 ..... 4, 38
Act of Nov. 5, 1990, Pub. L. No. 101-511, Title VIII, § 8077, 104 Stat. 1892 6
Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 6
Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.* 2
25 U.S.C. 1301-1303 ..... 2, 1a-3a
25 U.S.C. 1301(2) ..... *passim*
25 U.S.C. 1301(4) 6
25 U.S.C. 1302 ..... 34, 39, 1a
25 U.S.C. 1302(7) 20
25 U.S.C. 1303 ..... 42, 3a
25 U.S.C. 1321 4
Indian Major Crimes Act, 18 U.S.C. 1153 ..... 4, 5, 6, 15, 30, 35, 36
Indian Reorganization Act, 25 U.S.C. 476 36
Indian Tribal Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, § 103, 114 Stat. 2778 (25 U.S.C. 3363) 41
18 U.S.C. 111(a) 3, 20

Statutes and regulation—Continued: Page

18 U.S.C. 111(a)(1) 7, 8, 14
18 U.S.C. 111(b) 20
18 U.S.C. 1151 3
18 U.S.C. 1152 ..... 3, 4, 34
18 U.S.C. 1161 25
18 U.S.C. 1162 4
22 U.S.C. 1394 33
25 U.S.C. 476 36
25 U.S.C. 903-903f 26
28 U.S.C. 1291 8
28 U.S.C. 1360 4
42 U.S.C. 1983 33
Proclamation No. 2695, 60 Stat. 1352 33

Miscellaneous:

137 Cong. Rec. (1991):
p. 9445 40
p. 9446 19
pp. 10,712-10,714 19
p. 10,713 19
1 Vine Deloria, Jr. & Raymond J. DeMallie, *Treaties Between Indian Nations: Treaties, Agreements, and Conventions, 1775-1979* (1999) 29, 30
H.R. Conf. Rep. No. 261, 102d Cong., 1st Sess. (1991) 18, 19
H.R. Rep. No. 61, 102d Cong., 1st Sess. (1991) 18, 39, 42
Impact of the Supreme Court's Ruling in Duro *v.* Reina*: Hearing Before the Senate Select Comm. on Indian Affairs*, 102d Cong., 1st Sess. (1991):
Pt. 1 ..... 37, 39
Pt. 2 ..... 31, 37, 40, 41, 42
2 Op. Att'y Gen. 693 (1834) 44
17 Op. Att'y Gen. 566 (1883) 30, 31
Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Trial Courts and the Indian Civil Rights Act*, 69 Fordham L. Rev. 479 (2000) 42

Miscellaneous—Continued: Page

S. Rep. No. 168, 102d Cong., 1st Sess. (1991) 19, 37, 38
The Duro *Decision: Criminal Misdemeanor Jurisdiction in Indian Country: Hearing Before the House Comm. on Interior and Insular Affairs*, 102d Cong., 1st Sess. (1991) 28, 31, 32, 40

In the Supreme Court of the United States

No. 03-107

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY JO LARA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a- 22a) is reported at 324 F.3d 635. The vacated panel opinion (Pet. App. 23a-34a) is reported at 294 F.3d 1004. The opinion of the district court (Pet. App. 35a-43a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 2003. On June 13, 2003, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 22, 2003, and the petition was filed on that date. The petition for a writ of certiorari was granted on September 30, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Sections 1301 through 1303 of Title 25 of the United States Code are reproduced in the Appendix to this brief at 1a-3a.

STATEMENT

In *Duro* v. *Reina*, 495 U.S. 676 (1990), this Court held that Indian Tribes no longer possessed the inherent authority to enforce their criminal laws against members of other Tribes. In response to that decision, Congress amended the Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.*, to "recognize[] and affirm[]" Tribes' "inherent power * * * to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). This case concerns whether, in light of that amendment, a Tribe acts as a sovereign when it prosecutes a member of another Tribe, as the Ninth Circuit held in *United States* v. *Enas*, 255 F.3d 662 (2001) (en banc), cert. denied, 534 U.S. 1115 (2002), or whether a Tribe acts as an instrumentality of the United States, as

the Eighth Circuit held here. The resolution of that question determines whether successive prosecutions by a Tribe and by the United States for an offense with the same elements is permissible under the Double Jeopardy Clause of the Fifth Amendment.

1. As this Court has observed, "[c]riminal jurisdiction over offenses committed in 'Indian country' 'is governed by a complex patchwork of federal, state, and tribal law.'" *Negonsott* v. *Samuels*, 507 U.S. 99, 102 (1993) (quoting *Duro*, 495 U.S. at 680 n.1); see *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). Whether a crime committed in Indian country may be prosecuted by the United States, the State, or the Tribe depends, among other things, on the nature of the crime, the identities of the perpetrator and the victim, and the existence of specific statutory or treaty provisions addressing the subject.[1]

The United States may prosecute federal crimes of nationwide applicability—such as assault on a federal officer, 18 U.S.C. 111(a), the offense involved in this case—to the same extent in Indian country as elsewhere. For federal offenses that are not of nationwide applicability, federal authority to prosecute crimes involving Indians in Indian country is governed primarily by two statutes. The Indian Country Crimes Act, 18 U.S.C. 1152, provides that the federal criminal laws that apply in enclaves under exclusive federal jurisdiction apply within Indian country with certain exceptions. Section 1152 does not authorize federal

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[1] "Indian country" is defined as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government," "all dependent Indian communities within the borders of the United States," and "all Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. 1151.

prosecution of offenses committed by one Indian against the person or property of another Indian. Nor does Section 1152 authorize federal prosecution when the Indian offender has previously been punished under tribal law. The Indian Major Crimes Act, 18 U.S.C. 1153, enumerates 14 offenses that, if committed by an Indian in Indian country, are subject to the same laws and penalties that apply in areas of exclusive federal jurisdiction, whether or not the victim is an Indian and whether or not the defendant has been punished by the Tribe.

State authority to prosecute crimes involving Indians in Indian country is generally preempted as a matter of federal law. See, *e.g.*, *Negonsott*, 507 U.S. at 103; *United States* v. *Kagama*, 118 U.S. 375, 384 (1886). States, however, possess jurisdiction over crimes committed by non-Indians against non-Indians in Indian country. See *United States* v. *McBratney*, 104 U.S. 621 (1882). Congress has plenary authority to alter the balance of federal and state criminal jurisdiction in Indian country, *Negonsott*, 507 U.S. at 103, and has done so with respect to some States. Public Law 280 granted a number of States the authority to exercise general criminal jurisdiction over Indians in Indian country and made 18 U.S.C. 1152 and 1153 inapplicable in those areas. See Pub. L. No. 83-280, 67 Stat. 588, 18 U.S.C. 1162, 28 U.S.C. 1360; see also 25 U.S.C. 1321 (procedure for additional States to assume jurisdiction). In addition, Congress has enacted specific statutes authorizing a State to exercise criminal jurisdiction concurrently with the United States over Indians in some or all Indian country within the State.[2]

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[2] For example, Congress has authorized North Dakota to exercise criminal jurisdiction concurrently with the United States over Indians on the Spirit Lake Nation Reservation (formerly the Devil's Lake Indian Reservation), the site of the events that gave rise to the federal and tribal prosecutions at issue in this case. See Act of May 31, 1946, ch. 279, 60 Stat. 229; *State* v. *Hook*, 476 N.W.2d 565 (N.D. 1991).

This Court has held that Tribes have the power, by virtue of their retained inherent sovereignty, to prosecute their own members for violations of tribal law, so that a tribal member may be prosecuted by the United States and by his Tribe for an offense with the same elements. *United States* v. *Wheeler*, 435 U.S. 313, 323-324 (1978). The Court has also held, however, that Tribes were divested of their inherent power to prosecute non-Indians, and thus are precluded from bringing such prosecutions unless authorized to do so by Congress. *Oliphant*, 435 U.S. at 206-212. In *Duro*, 495 U.S. at 687-688, the Court further held that Tribes were divested of their inherent power to prosecute Indians who are members of other Tribes, sometimes referred to as "nonmember Indians," *id.* at 696

Duro created a potentially significant jurisdictional gap in law enforcement in Indian country. It appeared possible that neither the United States, nor the State, nor the Tribe could exercise jurisdiction if the putative Indian defendant was a member of another Tribe, the offense was not among the major crimes enumerated in 18 U.S.C. 1153 (or a generally applicable federal crime) and the victim was another Indian, and Congress had not authorized the State to exercise such jurisdiction. The *Duro* Court acknowledged that issue, 495 U.S. at 697-698, but reasoned that it was for Congress, "which has the ultimate authority over Indian affairs," to provide a solution, if needed, *id.* at 698.

Congress quickly closed that jurisdictional gap by amending the Indian Civil Rights Act to authorize Tribes to exercise criminal jurisdiction over "all Indians." See Pub. L. No. 101-511, Title VIII, § 8077, 104 Stat. 1892, 25 U.S.C. 1301(2); see also Pub. L. No. 102-137, § 1, 105 Stat. 646 (permanently enacting the amendment, which was originally effective only through September 30, 1991). In pertinent part, the amendment expanded the Indian Civil Rights Act's definition of Tribes' "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). The amendment also defined "Indian" to mean any person who would be subject to federal criminal jurisdiction as an "Indian" for purposes of 18 U.S.C. 1153. 25 U.S.C. 1301(4).[3]

2. Respondent is an enrolled member of the Turtle Mountain Band of Chippewa Indians, which governs a reservation in north-central North Dakota. The events that gave rise to respondent's tribal and federal prosecutions occurred on the Spirit Lake Nation Reservation, which is governed by the Spirit Lake Nation Tribe

[3] A person is subject to criminal jurisdiction as an "Indian" under 18 U.S.C. 1153 if he, like respondent, is an enrolled member of a federally recognized Tribe. *United States* v. *Antelope*, 430 U.S. 641, 646-647 n.7 (1977). In *Antelope*, the Court noted that some lower courts had concluded that tribal enrollment was not "an absolute requirement of federal jurisdiction, at least where the Indian defendant lived on the reservation and 'maintained tribal relations with the Indians thereon,'" but the Court did not itself express a view on whether such defendants were properly subject to federal jurisdiction under Section 1153. *Ibid.* (quoting *Ex parte Pero*, 99 F.2d 28, 30 (7th Cir. 1938), cert. denied, 306 U.S. 643 (1939)).

and which is located in northeastern North Dakota. Pet. App. 2a.

On June 13, 2001, police officers of the Bureau of Indian Affairs (BIA) arrested respondent for public intoxication on the Spirit Lake Nation Reservation. When the BIA officers reminded respondent that he was subject to an order excluding him from that reservation, respondent struck one of the officers with his fist. Pet. App. 2a, 23a.

Respondent pleaded guilty in the Spirit Lake Nation tribal court to three violations of the Spirit Lake Nation tribal code, consisting of violence against a police officer, resisting arrest, and public intoxication. He was sentenced to 90 days of imprisonment for the first of those offenses. Pet. App. 36a; Gov't C.A. Supp. Br. 2.

3. On August 29, 2001, respondent was indicted in the United States District Court for the District of North Dakota for assault on a federal officer, in violation of 18 U.S.C. 111(a)(1). The charge involved the same attack on the BIA police officer that was the subject of the tribal charge. Respondent consented to proceeding before a magistrate judge. Pet. App. 35a.

Respondent moved to dismiss the indictment on, *inter alia*, double jeopardy grounds. The government did not dispute that the tribal assault charge and the federal assault charge involved the same elements, so that successive tribal and federal prosecutions would be permissible under the Double Jeopardy Clause only if they were brought by separate sovereigns. See, *e.g.*, *Wheeler*, 435 U.S. at 316-319 (applying the dual sovereignty doctrine to successive tribal and federal prosecutions of a tribal member).

The magistrate judge rejected respondent's double jeopardy claim that he was being prosecuted twice by

the same sovereign. Pet. App. 37a-40a. The magistrate judge recognized that "the dual sovereignty doctrine applies only when the prosecuting entities derive their prosecutorial powers from independent sources." *Id.* at 37a. The magistrate judge found that requirement to be satisfied in this case, reasoning that the United States and the Tribe each exercises its own sovereign authority in prosecuting a member of another Tribe. See *id.* at 40a. The magistrate judge explained that the post-*Duro* amendment to Section 1301(2) is "a valid recognition of inherent rights of Indian tribes," not a delegation of the United States' own prosecutorial power to Tribes. *Id.* at 40a.

Respondent conditionally pleaded guilty to the violation of 18 U.S.C. 111(a)(1), preserving his double jeopardy claim as well as a selective prosecution claim. He took an interlocutory appeal before sentencing. Pet. App. 35a-36a.[4]

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[4] This Court has held that pretrial orders denying motions to dismiss indictments on double jeopardy grounds are "final decisions," within the meaning of 28 U.S.C. 1291, and thus are immediately appealable. *Abney* v. *United States*, 431 U.S. 651, 656-662 (1977). In classifying such orders as within the "small class of cases" that are "beyond the confines of the final-judgment rule," the Court explained that they "constitute a complete, formal, and, in the trial court, final rejection of a criminal defendant's double jeopardy claim," are "collateral to, and separable from, the principal issue at the accused's impending criminal trial," and involve rights that cannot be fully vindicated on an appeal following a final judgment. *Id.* at 659-660. Here, in contrast to the ordinary case in which a defendant takes a collateral order appeal from a pretrial order rejecting a double jeopardy claim, respondent took an appeal only after jeopardy had attached in the second prosecution. That choice does not appear to affect the finality of the order for purposes of Section 1291.

4. A divided panel of the court of appeals affirmed. Pet. App. 23a-28a.

The panel concluded that the Double Jeopardy Clause did not require the dismissal of the federal prosecution, because the tribal prosecution and the federal prosecution were brought by different sovereigns. Pet. App. 27a The panel recognized that this Court's decision in *Duro* held that Tribes no longer had the inherent sovereign power to prosecute members of other Tribes. *Id.* at 25a. The panel reasoned, however, that *Duro* was grounded on federal common law, not on any constitutional limitation on tribal sovereignty. *Id.* at 26a-27a. Accordingly, the panel concluded that Congress could modify the federal common law as reflected in *Duro*, and that Congress did so by amending the Indian Civil Rights Act to "recognize[] inherent tribal power." *Id.* at 27a.[5]

Chief Judge Hansen dissented. Pet. App. 28a-34a. He reasoned that the authority for the tribal prosecution and the federal prosecution derived from a single source—"the legislative authority of the federal Congress exercising, with the President's approval, the power of the United States." *Id.* at 34a. He concluded that "[t]he dual sovereignty limitation on the constitutional protection from double jeopardy is therefore inapplicable." *Ibid.*

5. After granting rehearing en banc, the court of appeals reversed and remanded with directions to dismiss the indictment. Pet. App. 1a-11a.

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[5] The panel, like the magistrate judge, also rejected respondent's claim that the United States had engaged in impermissible selective prosecution based on race. Pet. App. 27a-28a; see *id.* at 40a-42a. The en banc court did not address that claim.

a. The court of appeals recognized that respondent's double jeopardy claim turned on whether the United States and the Tribe "exercised authority derived from the same ultimate source of power" in prosecuting him. Pet. App. 4a. The court concluded that a Tribe does not exercise its own sovereign power when it prosecutes a member of another Tribe as authorized by 25 U.S.C. 1301(2), relying on *Duro*'s holding that, "[i]n the area of criminal enforcement," a Tribe's retained sovereign power "does not extend beyond internal relations among members." Pet. App. 6a (quoting *Duro*, 495 U.S. at 688).

The court of appeals rejected the panel's characterization of *Duro* as "a common law decision that Congress had the power to override via the [Indian Civil Rights Act] amendments." Pet. App. 8a. The court instead "conclude[d] that the distinction between a tribe's inherent and delegated powers is of constitutional magnitude and therefore is a matter ultimately entrusted to the Supreme Court." *Ibid.* "Once the federal sovereign divests a tribe of a particular power," the court reasoned, "it is no longer an inherent power and it may only be restored by delegation of Congress's power." *Ibid.*

The court of appeals concluded, however, that it "need not construe the [Indian Civil Rights Act] amendments as a legal nullity." Pet. App. 10a. Rather, choosing to give effect to Congress's intent "to allow tribes to exercise criminal misdemeanor jurisdiction over nonmember Indians," the court interpreted amended Section 1301(2) as delegating federal power to Tribes. *Ibid.* Accordingly, the court held that, because respondent was "necessarily prosecuted pursuant to that delegated [federal] power," the "dual sovereignty doctrine does not apply," and the prosecution brought

by the United States was barred by the Double Jeopardy Clause. *Id.* at 11a.

b. Judge Morris Sheppard Arnold, joined by three other members of the court, dissented. Pet. App. 11a-22a.

Judge Arnold understood this Court's decision in *Duro* to be based not on the Constitution, but on federal common law. Pet. App. 11a. He reasoned that the post-*Duro* amendment to the Indian Civil Rights Act is a permissible exercise of Congress's "plenary legislative power over federal common law in general and Indian affairs in particular to define the scope of inherent Indian sovereignty." *Ibid.* Accordingly, he concluded that, "[b]ecause the Spirit Lake Nation, in trying [respondent], was simply exercising its own sovereignty, and not a power that Congress delegated to it, [respondent's] double jeopardy rights were not violated." *Id.* at 11a-12a.

SUMMARY OF ARGUMENT

The Double Jeopardy Clause of the Fifth Amendment is not violated when a defendant is prosecuted by separate sovereigns for offenses that contain the same elements. As this Court has recognized, therefore, both the United States and an Indian Tribe may prosecute a member of that Tribe for such an offense, because each exercises its own sovereign power in doing so. *United States* v. *Wheeler*, 435 U.S. 313 (1978). The same rule applies when a tribal member is prosecuted by both the United States and by a Tribe other than his own pursuant to the power recognized in 25 U.S.C. 1301(2). The tribal prosecution involves an exercise of a restored sovereign power that predates the Constitution and laws of the United States and that derives from a source independent of them.

Section 1301(2) can be understood only as a restoration to Tribes of the sovereign power that *Duro* v. *Reina*, 495 U.S. 676 (1990), held that they had lost as a result of their dependent status. Section 1301(2), by its terms, defines Tribes' "powers of self-government" to include "the inherent power * * * to exercise criminal jurisdiction over all Indians." A power that is "inherent" and exercised as an aspect of "self-government" is necessarily a sovereign power. The congressional reports and floor statements confirm that Congress's intent was to recognize a tribal sovereign power. To construe Section 1301(2) instead as a delegation of federal power would undermine Congress's purpose of protecting reservation communities against crimes committed by non-member Indians. That is because a tribal prosecution of a non-member Indian, in which only misdemeanor-type penalties could be imposed, then would bar a federal prosecution for an offense with the same elements, including a greater-encompassing offense. The court of appeals thus erred in rewriting Section 1301(2), contrary to its text, history, and purpose, as a delegation of federal power to Tribes.

The court of appeals also erred in concluding that the Constitution barred Congress from restoring Tribes' sovereign power to prosecute members of other Tribes. Congress has plenary authority under the Constitution to legislate with respect to Tribes and tribal Indians, including the authority to expand or contract the scope of tribal powers of self-government. Section 1301(2) does not, on its face or as applied in this case, violate the constraints imposed on Congress by the Fifth Amendment's Due Process Clause, including its equal protection component. Congress can constitutionally single out all tribal members, as a political group, for

unique burdens or benefits, so long as it has a rational basis for doing so, as it did here in seeking to close a jurisdictional gap in Indian country law enforcement and to strengthen tribal self-government. The Indian Civil Rights Act entitles defendants in tribal court to most of the same protections to which defendants are entitled in state court under the Due Process Clause. And, although the Indian Civil Rights Act does not guarantee certain protections such as appointed counsel in cases involving incarceration, tribal prosecutions can be, and often are, conducted consistently with those protections. Respondent has not identified any such protection that was denied him in tribal court.

Even if Congress could not constitutionally restore Tribes' sovereign power to prosecute non-member Indians, respondent's double jeopardy challenge would fail. If the Tribe did not have criminal jurisdiction over respondent, then jeopardy never attached in his prosecution in tribal court, for "before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged." *Grafton* v. *United States*, 206 U.S. 333, 345 (1907). The tribal prosecution could not, therefore, bar respondent's subsequent prosecution by the United States.

ARGUMENT

THE UNITED STATES IS NOT BARRED BY THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT FROM PROSECUTING RESPONDENT FOR A FEDERAL OFFENSE THAT CONTAINS THE SAME ELEMENTS AS THE TRIBAL OFFENSE FOR WHICH HE WAS PREVIOUSLY PROSECUTED

I. THE DOUBLE JEOPARDY CLAUSE PERMITS THE UNITED STATES AND AN INDIAN TRIBE, AS SEPARATE SOVEREIGNS, TO PROSECUTE A NON-MEMBER INDIAN FOR CRIMES THAT CONTAIN THE SAME ELEMENTS

The United States is not precluded by the Double Jeopardy Clause from prosecuting respondent for assault on a federal officer, in violation of 18 U.S.C. 111(a)(1), even though respondent had previously been prosecuted by a Tribe other than his own for an offense with the same elements. That is because the Tribe, in exercising the criminal jurisdiction over "all Indians" recognized in 25 U.S.C. 1301(2), was acting as a sovereign, not as an instrumentality of the United States. Section 1301(2), as its text, history, and purpose make clear, was designed to restore Tribes' sovereign power to punish violations of their laws by members of other Tribes. Nothing in the Constitution prevents Congress from restoring that sovereign power.

A. The Double Jeopardy Clause Has No Application To Prosecutions By Separate Sovereigns

The Double Jeopardy Clause states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The dual sovereignty doctrine permits prosecutions by separate sovereigns for offenses with the same ele-

ments, because violations of the laws of separate sovereigns are not the "same offence" for purposes of the Double Jeopardy Clause. See *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985) ("When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'").

"In applying the dual sovereignty doctrine," this Court has explained, "the crucial determination is whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns"—that is, "whether the two entities draw their authority to punish the offender from distinct sources of power." *Heath*, 474 U.S. at 88. Applying that analysis, the Court has held that the United States and a State are separate sovereigns, see *United States* v. *Lanza*, 260 U.S. 377, 382 (1922), as are two States, see *Heath*, 474 U.S. at 89-90. In contrast, the United States is not a sovereign separate from its territories and possessions, see *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 264-265 (1937), and a State is not a sovereign separate from its municipalities, see *Waller* v. *Florida*, 397 U.S. 387, 393 (1970).

In *Wheeler*, this Court considered whether the United States could prosecute a member of the Navajo Nation for statutory rape, one of the major crimes enumerated in 18 U.S.C. 1153, after he had been prosecuted by the Navajo Nation for the lesser included offense of contributing to the delinquency of a minor. The Court reasoned that the issue turned on the ultimate "source of [a Tribe's] power to punish tribal offenders: Is it a part of inherent tribal sovereignty, or an aspect of the sovereignty of the Federal Government which has been delegated to the tribes by Congress?" 435 U.S. at 322. The Court concluded that, when a

Tribe prosecutes a tribal member for a violation of tribal law, "the tribe acts as an independent sovereign, and not as an arm of the Federal Government," *id.* at 329, and thus that the federal prosecution is permissible under the Double Jeopardy Clause, *id.* at 329-330.

In assessing the scope of Tribes' inherent sovereignty, the *Wheeler* Court explained that Tribes originally possessed "the full attributes of sovereignty," including "the inherent power to prescribe laws for their members and to punish infractions of those laws." 435 U.S. at 322-323 (quoting *United States* v. *Kagama*, 118 U.S. 375, 381 (1886)). In contrast, the Court said, the sovereignty that Tribes retain today "is of a unique and limited character," existing "only at the sufferance of Congress" and "subject to complete defeasance." *Id.* at 323. The Court added, however, that Tribes "still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Ibid.* The Court concluded that Tribes' sovereign power to exercise criminal jurisdiction over their own members had not been extinguished by Congress or surrendered incident to their entering into a dependent relationship with the United States. *Id.* at 323-328.

In *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court distinguished Tribes' criminal jurisdiction over their own members from their criminal jurisdiction over non-Indians. There, the Court declined to recognize an inherent tribal power to prosecute non-Indians, reasoning that, "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Id.* at 210. The Court concluded that Tribes could not exercise such power

absent a "treaty provision or Act of Congress." *Id.* at 196 n.6.

In *Duro*, the Court considered the unresolved issue at the "intersection" of *Wheeler* and *Oliphant*—namely, whether Tribes retained the inherent power to prosecute Indians who are members of other Tribes. 495 U.S. at 684. The Court concluded that its recognition of such an inherent power would be inconsistent with Tribes' dependent status, and it held that a Tribe could not prosecute non-member Indians under the current jurisdictional scheme. "If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement," the Court continued, "then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs." *Id.* at 698.

B. The Post-*Duro* Amendment To The Indian Civil Rights Act Can Only Be Understood As A Restoration Of Tribes' Sovereign Power To Prosecute Violations Of Their Laws By Members Of Other Tribes

In response to this Court's decision in *Duro* and resulting concerns about Indian country law enforcement, Congress amended 25 U.S.C. 1301(2), the provision of the Indian Civil Rights Act that defines the Tribes' "powers of self-government." The amendment states that those powers include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). The text, history, and purpose of the amendment confirm that it was designed exclusively as a restoration of a tribal sovereign power. The amendment cannot plausibly be construed as a delegation of federal power to Tribes—even if such a construction

would be necessary, as the court of appeals mistakenly perceived, to save it from constitutional invalidity.

1. The text of amended Section 1301(2) speaks of restoring a tribal sovereign power

The text of Section 1301(2), as amended after *Duro*, reflects Congress's intent to authorize Tribes to act as sovereigns, not as instrumentalities of the United States, when prosecuting violations of their laws by members of other Tribes. Criminal jurisdiction exercised by Tribes as a "power[] of *self*-government" necessarily refers to jurisdiction derived from a source of power distinct from the Constitution and laws of the United States. See *Heath*, 474 U.S. at 88. The amendment, moreover, "recognize[s]" and "affirm[s]" the existence of that criminal jurisdiction as an "inherent power of Indian tribes," not a delegation of federal power.

2. The legislative history of amended Section 1301(2) reflects Congress's intent to restore a tribal sovereign power

The legislative history of the post-*Duro* amendment to Section 1301(2) confirms that Congress intended to recognize a tribal sovereign power to prosecute members of other Tribes. The Conference Report, after stating that "tribal governments have always held" the "inherent authority" to "exercise criminal jurisdiction over all Indians on their reservations," explains that the amendment "is not a delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations." H.R. Conf. Rep. No. 261, 102d Cong., 1st Sess. 3 (1991). The House Interior and Insular Affairs Committee Report contains similar language. See H.R. Rep. No. 61, 102d Cong., 1st Sess. 7 (1991) (stating that the amendment is "a clarification of

the status of tribes as domestic dependent nations," and "is not a federal delegation"). And the Senate Select Committee on Indian Affairs Report explains that the amendment "recognize[s] and reaffirm[s] the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians." S. Rep. No. 168, 102d Cong., 1st Sess. 4 (1991).

During the congressional debates, Members of Congress described the amendment as a restoration of a tribal sovereign power that *Duro* held had been lost, not as a delegation of federal power. For example, Representative Miller, the House floor manager for the amendment, explained that the amendment "recognizes an inherent tribal right which always existed," and "is not a delegation of authority." 137 Cong. Rec. 10,712-10,714 (1991). Representative Richardson, a sponsor of the amendment, described it as "reaffirm[ing]" such tribal power. *Id.* at 10,713. Similarly, Senator Inouye, the Senate floor manager, stated that the amendment's "premise * * * is that the Congress affirms the inherent jurisdiction of tribal governments over nonmember Indians." *Id.* at 9446. No Member of Congress suggested that the amendment would have the effect of making Tribes instrumentalities of the United States in the prosecution of non-member Indians.

3. Congress's purpose to combat crime by non-member Indians demonstrates that amended Section 1301(2) was designed to restore tribal sovereign power

The understanding that the post-*Duro* amendment to Section 1301(2) was intended as a restoration of tribal sovereign power comports with its purpose of preserving "public safety" in Indian country. H.R. Conf. Rep. No. 261, *supra*, at 6. That purpose would be

undermined if the amendment were construed, as the court of appeals construed it, to authorize Tribes to exercise *federal* prosecutorial power over members of other Tribes. In that event, whenever a non-member Indian committed a federal offense in Indian country, a tribal prosecution for an offense with the same elements, including any lesser-included offense, would bar a subsequent federal prosecution. See *Rutledge* v. *United States*, 517 U.S. 292, 297 (1996) (Double Jeopardy Clause bars successive prosecutions for lesser-included and greater-encompassing offenses because they are the "same offence" within the meaning of the Clause).

Although Tribes may prosecute all offenses committed by Indians on their reservations, the punishment for any offense is limited to one year of imprisonment, a $5000 fine, or both. 25 U.S.C. 1302(7). Often, therefore, a tribal prosecution of a non-member Indian, even if successful, could not result in a sentence that adequately vindicates federal interests. Here, for example, the federal offense of assault on an officer of the United States, while carrying misdemeanor penalties when it involves "only simple assault," carries penalties of as much as 20 years of imprisonment if the defendant used a deadly or dangerous weapon or inflicted bodily injury. See 18 U.S.C. 111(a) and (b).

In many instances, a Tribe could be expected to defer its own prosecution of a non-member Indian until the United States decided whether to prosecute. The risk would nonetheless exist that, whether as a result of choice or inadvertence, a tribal prosecution could occur before a decision whether to pursue federal charges had been made. A Tribe may have different law enforcement priorities and objectives than does the United States; for example, a Tribe may perceive that a violation of tribal law is more effectively addressed within the reservation community by measures other than incarceration. A non-member Indian would have a great incentive to enter a prompt plea in a tribal prosecution, thereby gaining protection from federal prosecution. See *Wheeler*, 435 U.S. at 330-331 (noting that, if a Tribe could prosecute its own members only as an instrumentality of the United States, tribal members would have an incentive to plead guilty to tribal offenses to avoid prosecution for federal offenses carrying more severe penalties).

Congress should not be presumed to have intended to incapacitate the United States, in circumstances such as those presented here, from prosecuting violations of its criminal laws by non-member Indians. Rather, the only sensible interpretation of the post-*Duro* amendment, consistent with its text and history, is as a restoration of Tribes' own criminal jurisdiction, not as a delegation of federal criminal jurisdiction to Tribes.

4. Principles of constitutional avoidance do not justify construing amended Section 1301(2) as a delegation of federal power

The court of appeals recognized that Congress intended in the post-*Duro* amendment to Section 1301(2) to restore Tribes' sovereign power to prosecute members of other Tribes. See Pet. App. 6a, 9a-10a. Yet, having concluded (erroneously, as explained below) that the Constitution prevents Congress from restoring tribal sovereign powers that this Court has held were lost, the court of appeals declined to construe the amendment as "a legal nullity." *Id.* at 10a. The court of appeals instead sought to effectuate Congress's "wish[] to allow tribes to exercise criminal misdemeanor jurisdiction over nonmember Indians" by construing Section

1301(2) as a delegation of the United States's power to Tribes. *Id.* at 10a-11a.

That was error. Although courts may "strain to construe legislation so as to save it against constitutional attack," they may not "carry this to the point of perverting the purpose of a statute * * * or judicially rewriting it." *Heckler* v. *Mathews*, 465 U.S. 728, 741-742 (1984) (internal citation and quotation marks omitted); see, *e.g.*, *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 841 (1986); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964); *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 518 (1926) ("[I]t is very clear that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save the law from conflict with constitutional limitations."). Here, "the intention of the Congress is revealed too distinctly to permit [a court] to ignore it," *George Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 379 (1933), in the text, history, and purpose of amended Section 1301(2). See pp. 18-21, *supra*. Section 1301(2) must stand or fall, therefore, as a restoration of tribal sovereign power.

C. Congress Has Constitutional Authority To Restore Aspects Of Sovereignty Lost By Tribes By Virtue Of Their Dependent Status, Including The Sovereign Power To Prosecute Non-Member Indians

Congress possesses "plenary and exclusive power" to legislate with respect to Tribes and their members. *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 470-471 (1979); accord, *e.g.*, *Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 531 n.6 (1988); *Negonsott* v. *Samuels*, 507 U.S. 99, 103 (1993); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978). Such power "is drawn both explicitly and implicitly from the

Constitution itself"—in particular, from its grants to Congress of the power "[t]o regulate Commerce * * * with the Indian Tribes," Art. I, § 8, Cl. 3, and to the President, with the advice and consent of the Senate, of the power to make treaties, Art. II, § 2, Cl. 2. *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974); see *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (explaining that the Constitution, "by declaring treaties already made * * * to be the supreme law of the land, * * * admits [the Indian nations'] rank among those powers who are capable of making treaties").

Under these explicit and implicit grants of authority, and as a consequence of the "course of dealing" between the United States and Tribes, *Kagama*, 118 U.S. at 384-385, Congress has "the power and the duty of exercising a fostering care and protection over all dependent Indian communities." *United States* v. *Sandoval*, 231 U.S. 28, 45-46 (1913); see *Board of County Comm'rs* v. *Seber*, 318 U.S. 705, 715 (1943). Congress's plenary power over Indian affairs necessarily includes the power to regulate relations among Tribes and tribal Indians. In particular here, it includes the power to furnish needed "protection" to reservation Indian communities by recognizing in Tribes the authority to prosecute members of other Tribes for offenses committed on their reservations.

1. Congress's plenary authority over Tribes permits the restoration of the tribal sovereign power to prosecute non-member Indians

It is well settled that "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Santa Clara Pueblo*, 436 U.S. at 56; see *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold*

Eng'g, 476 U.S. 877, 891 (1986) (observing that all "aspect[s] of tribal sovereignty" are "subject to plenary federal control and definition"); *Wheeler*, 435 U.S. at 327 ("[I]n the exercise of the powers of self-government, as in all other matters, the Navajo Tribe, like all Indian tribes, remains subject to ultimate federal control."). The Court has recognized that Congress may permissibly "modify" Tribes' powers of self-government by authorizing the exercise of powers that could not otherwise be exercised as a consequence of Tribes' dependent status.

In *Montana* v. *United States*, 450 U.S. 544 (1981), for example, the Court considered whether Tribes retained the sovereign power to regulate non-Indians' hunting and fishing on lands owned by non-Indians within their reservations. The Court concluded that such an "exercise of tribal power * * * is inconsistent with the dependent status of the tribes, *and so cannot survive without express congressional delegation*." *Id.* at 564 (emphasis added), The Court thus made clear that Congress could remove impediments that would otherwise exist to the exercise of that power. In other cases as well, the Court, while concluding that Tribes no longer possessed the inherent power to regulate certain activities of non-Indians, contemplated that Congress could restore that power to Tribes. See, *e.g.*, *Nevada* v. *Hicks*, 533 U.S. 353, 359, 364-366 (2001); *South Dakota* v. *Bourland*, 508 U.S. 679, 695 (1993); *Brendale* v. *Confederated Yakima Indian Nation*, 492 U.S. 408, 428 (1989) (opinion of White, J.); *id.* at 446-447 (opinion of Stevens, J.).

The Court's decision in *United States* v. *Mazurie*, 419 U.S. 544 (1975), reinforces the conclusion that Congress may authorize Tribes to exercise powers that they could not otherwise exercise as a consequence of their

dependent status. There, the Court sustained 18 U.S.C. 1161, which provides that liquor sales in Indian country, including those by non-Indians, can occur only in conformity with any applicable tribal ordinance. See 419 U.S. at 556-558. The Court rejected the argument that Section 1161 exceeds constitutional limitations on Congress's ability to delegate its own legislative power. The Court explained that "[t]hose limitations are * * * less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter"—as do Tribes with regard to "matters that affect the internal and social relations of tribal life," such as "the distribution and use of intoxicants." *Id.* at 556-557. Without deciding whether the sovereign power of a Tribe would be sufficient to support the regulation absent the grant of congressional authority, the Court held that "the independent tribal authority is quite sufficient to protect Congress's decision to vest in tribal councils this portion of its own authority 'to regulate Commerce * * * with the Indian tribes.'" *Id.* at 557.

The Court's use of the term "delegation" in *Montana*, *Mazurie*, and other cases does not imply that a power exercised by Tribes as a result of congressional action can only be a federal power. Those cases did not turn on any distinction between restored tribal power and delegated federal power. Moreover, the Court used the term in *Montana* to encompass action by Congress that restores a "tribal power" that had been divested. See *Montana*, 450 U.S. at 564 (stating that a preempted "tribal power . . . cannot survive without express congressional delegation"). And in *Bourland*, which also concerned whether a Tribe could regulate hunting and fishing on reservation lands that were no longer in Indian hands, the Court noted the potential relevance

of "treaties or statutes" evincing that "Congress intended to allow the Tribe to assert jurisdiction over [certain] lands *pursuant to inherent sovereignty*." 508 U.S. at 695 (emphasis added).[6]

The Court's decisions thus recognize that Congress, in the exercise of its plenary authority over Indian affairs, may expand as well as contract the scope of tribal sovereign powers. Congress permissibly exercised that authority in restoring Tribes' sovereign power to prosecute members of other Tribes.

2. Duro does not suggest that the scope of tribal criminal jurisdiction is fixed in the Constitution and cannot be altered by Congress

The court of appeals reasoned that *Duro*'s articulation of the scope of retained tribal sovereignty was based on the Constitution, and therefore that Congress could not restore the tribal sovereign power that *Duro* held to have been lost. See Pet. App. 4a-9a. The court of appeals' reasoning rested on an erroneous premise.

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[6] On a number of occasions, Congress has acted to restore federal recognition to a Tribe, and thereby enabled the Tribe to exercise sovereign powers that could not be exercised without such recognition. See, *e.g.*, 25 U.S.C. 903-903f (restoring Menominee Tribe's federal recognition and "reinstat[ing] all rights and privileges of the tribe or its members under Federal treaty, statute, or otherwise which may have been diminished or lost pursuant to" an earlier withdrawal of recognition). As the Seventh Circuit recently held, after such a restoration of federal recognition, a Tribe exercises its own sovereign power in prosecuting a tribal member, so that a subsequent prosecution by the United States for an offense with the same elements does not violate the Double Jeopardy Clause. *United States* v. *Long*, 324 F.3d 475, 483 (7th Cir. 2003) ("Congress had the power to undo by legislation that which it had accomplished by legislation—restoring to the Menominee the inherent sovereign power that it took from them in 1954."), cert. denied, No. 02-1801 (Oct. 6, 2003).

Duro was a federal common law decision, not a constitutional one.

a. The Constitution does not address the extent to which Tribes retain sovereign powers after their incorporation into the United States. From the early years of this Nation, tribal sovereignty has been understood to be subject to adjustment by federal treaties and statutes. To the extent that Congress has not spoken directly to the issue, tribal sovereignty has been treated as a matter of federal common law. See *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 16-19 (1831) (Marshall, C.J.); see also *Oliphant*, 435 U.S. at 206 (observing that "'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress," which "beyond their actual text form the backdrop for the intricate web of judicially made Indian law").

This Court's decision in *Duro* thus did not rest on any provision of the Constitution. As the dissenting judges in the court of appeals explained, "the Supreme Court in [*Duro*] did not base its decision on the Constitution, nor did the Constitution require the result that the Court reached there." Pet. App. 11a (Morris Sheppard Arnold, J., dissenting). "The result in that case was instead based on federal common law," *ibid.*, as informed by various non-constitutional sources, including statutes, treaties, and federal court practice. See 495 U.S. at 688-692.

Accordingly, Congress was not constitutionally precluded from altering the result of the *Duro* decision by prospectively restoring to Tribes the sovereign power to prosecute non-member Indians. Indeed, both *Duro* and *Oliphant* suggest that the scope of tribal criminal jurisdiction articulated in those cases could be modified by future congressional action. See *Duro*, 495

U.S. at 698; *Oliphant*, 435 U.S. at 212; cf. *Wheeler*, 435 U.S. at 328 n.28 ("[W]e do not mean to imply that a tribe which was deprived of [criminal jurisdiction] * * * and then regained it by Act of Congress would necessarily be an arm of the Federal Government.").

b. The conclusion that this Court's holding in *Duro* was not compelled by the Constitution is reinforced by the historical fact that Tribes exercised criminal jurisdiction over members of other Tribes well after the ratification of the Constitution. As Congress was informed during its consideration of the legislation at issue here, "[i]n the period from the founding of the Republic until the latter part of the last [*i.e.*, nineteenth] century," "[t]ribes exercised authority over members of other tribes who married into the tribe, were adopted into its families, or otherwise became part of the tribal community voluntarily," as well as "members of other tribes who voluntarily came to visit or to trade." *The* Duro *Decision: Criminal Misdemeanor Jurisdiction in Indian Country: Hearing Before the House Comm. on Interior and Insular Affairs*, 102d Cong., 1st Sess. 155 (1991) (*House Hearing*), (statement of Richard Collins, law faculty, University of Colorado).[7]

During the period surrounding the ratification of the Constitution, the United States entered into a number of treaties authorizing Tribes to "punish * * * or not, as they please," "any citizen of the United States, or other person not being an Indian" who settled on tribal lands. Treaty with the Cherokee, Aug. 7, 1790, Art.

[7] Much of the historical material discussed in this subsection was not presented to the Court in *Duro*.

VIII, 7 Stat. 39.[8] That those treaties made no mention of the Tribe's authority to punish Indians who were members of other Tribes (and who generally were not United States citizens at that time) implies that such authority was unquestioned.

Several agreements entered into among Tribes during the nineteenth century recognized those Tribes' authority to prosecute all Indians within their territory. In 1886, after certain eastern Tribes had been removed to the Indian Territory, those Tribes entered into a compact that provided, *inter alia*, that "[i]f a citizen of one Nation commits wilful murder, or other crime within the limits of another Nation, party hereto, he shall be subject to the same treatment as if he were a citizen of that Nation." Compact of the Five Civilized Tribes, Mar. 15, 1886, Sec. 4, *reprinted in* 1 Vine Deloria, Jr. & Raymond J. DeMallie, *Treaties Between Indian Nations: Treaties, Agreements, and Conventions, 1775-1979*, at 742 (1999) (*Indian Treaties*). Virtually identical provisions appeared in at least two earlier tribal compacts. See Compact Between the Cherokee, Creek, Chickasaw, and Seminole, Nov. 8-15, 1859, Art. 4, *Indian Treaties*, 739; Compact Between the Cherokee, Creek, and Osage, July 3, 1843, Sec. 5, *Indian Treaties*, 737; see also Treaty Between the Osage and the Delaware, Shawnee, Kickapoo, Wea, Piankeshaw, and Peoria, Oct. 7, 1826, Art. 3, *Indian Treaties*, 693 (providing that members of one Tribe would not hunt on land in the State of Missouri and the

[8] See Treaty with the Creeks, Aug. 7, 1790, Art. VI, 7 Stat. 35; Treaty with the Chickasaw, Jan. 10, 1786, Art. IV, 7 Stat. 24; Treaty with the Choctaw, Jan. 3, 1786, Art. IV, 7 Stat. 21; Treaty with the Cherokee, Nov. 28, 1785, Art. V, 7 Stat. 18; Treaty with the Wyandot, Jan. 21, 1785, Art. V, 7 Stat. 16.

Territory of Arkansas reserved for the other Tribe "under the penalty of any injury they may receive on said reservation").[9]

A Tribe's authority to exercise criminal jurisdiction over members of other Tribes was acknowledged by the Attorney General in an 1883 opinion, which concluded that the United States did not have the authority under a treaty with the Arapahoe Tribe to prosecute an alleged murder of an Arapahoe Indian by a Creek Indian within the territory of the Pottawatomie Tribe. 17 Op. Att'y Gen. 566.[10] The Attorney General observed that a federal prosecution of the offense would constitute a departure from "the United States * * * general policy" of leaving to Tribes the "redress of offenses committed by members of other tribes." *Id.* at 568. Although the Pottawatomie did not have a law that allowed it to prosecute the crime, the Attorney General suggested that either the Arapahoe, the Tribe of the victim, or the Creek, the Tribe of the accused,

[9] Agreements sometimes specified other means of addressing crimes committed by a member of one Tribe within the territory of another Tribe. See, *e.g.*, Treaty Between the Creek and Osage, May 10, 1831, Art. 2d, *Indian Treaties*, 698 (providing that a member of one Tribe who was accused of "Murder, or Capital offense" against a member of the other Tribe would "be brought before a council of at least ten Chiefs of each nation to be punished agreeable to their decision"); Treaty Between the Creek and Cherokee, Dec. 11, 1821, Arts. 8-9, *Indian Treaties*, 688-689 (providing that "[i]f any Cherokee should come over the lines & commit murder or theft to the Creeks, the Creeks will make a demand of the Cherokees for satisfaction," and that "[i]f any Creeks should come over the line & commit murder or theft to the Cherokees, the Cherokees will make a demand of the Creeks for satisfaction").

[10] The opinion predated the enactment of the Indian Major Crimes Act. See p. 4, *supra*.

might have a law that would allow it to do so. *Id.* at 570.

A substantial body of evidence presented to Congress confirms Tribes' exercise of criminal jurisdiction over all Indians within their territory well after the ratification of the Constitution. Indeed, a number of tribal leaders testified that their Tribes had continuously until *Duro* exercised criminal jurisdictionover members of other Tribes.[11]

[11] See, *e.g.*, *Impact of the Supreme Court's Ruling in* Duro *v.* Reina: *Hearing Before the Senate Select Comm. on Indian Affairs*, 102d Cong., 1st Sess. Pt. 2, at 36 (1991) (*Senate Hearing 2*) (statement of Lawrence D. Wetsit, Chairman, Fort Peck Tribal Executive Board) ("The Fort Peck Assiniboine and Sioux Tribes have historically always enjoyed jurisdiction over nonmember Indians on our reservation."); *id.* at 55 (statement of Harry Smiskin, Tribal Council Member, Yakima Indian Nation) ("[H]istorically, Indians from the entire Northwest came to trade and do business with the Yakima Nation. They were welcome on our lands, and at no time in history has any Indian ever indicated that he should be immune from our tribe's jurisdiction, be it in the historical traditional manner or the more Anglo-type and style of criminal justice now practiced by our courts."); *id.* at 62 (statement of Robert Lewis, Governor, Pueblo of Zuni) ("We have exercised jurisdiction over non-Zuni Indians for over 450 years within the legal framework of Spain, Mexico, and the United States."); *id.* at 185-186 (statement of The Cheyenne River Sioux Tribe) (describing incident in which Cheyenne authorities punished a violation of Cheyenne law by Sioux who were living among the Cheyenne); *House Hearing* 94 (statement of Michael T. Pablo, Chairman, Confederated Salish and Kootenai Tribes) ("Historically, the Confederated Salish and Kootenai Tribes have always exercised criminal jurisdiction over" members of other Tribes, whether they permanently resided on the Tribes' reservation or visited for ceremonies and other events.); *id.* at 102 (statement of Zane Jackson, Chairman, Warm Springs Tribal Council) ("From the time the Warm Springs Reservation was first established by the Treaty of June 25, 1855, our people have exer-

3. Congress has been recognized to have the authority in other contexts to remove impediments to the exercise of sovereign power without delegating federal power

In other contexts as well, Congress has been recognized to possess the ability to restore, or to remove impediments to the exercise of, sovereign powers derived from a source of authority independent of the Constitution and laws of the United States.

For example, although the Commerce Clause operates as a constraint on the States' sovereign power to regulate interstate commerce occurring within their borders, Congress may authorize States to exercise that power in a manner that the Commerce Clause would otherwise forbid. See *Hillside Dairy Inc.* v. *Lyons*, 123 S. Ct. 2142, 2147 (2003) ("Congress certainly has the power to authorize state regulations that burden or discriminate against interstate commerce."). In regulating commerce pursuant to such a congressional authorization, a State exercises its own sovereign power, not delegated federal power. See *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 437-438 (1946) (concluding that, when a State imposes taxes in the exercise of its congressionally authorized power to tax insurance, the State is not subject to the requirement of

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cised jurisdiction over Indians from other tribes who came to visit or live on our reservation. Even before the reservation was created, it was always the traditional law of our people that Indians from other tribes who came into our sovereign territory were subject to our laws."); *id.* at 178 (statement of Donna M. Christensen, Attorney General, Navajo Nation) ("The Navajo people have interacted with other tribes from the beginning of our history. Not surprisingly, the Navajo people, like other tribes, have always exercised what is known as criminal jurisdiction over nonmember Indians when necessary.").

Article I, Section 8, of the Constitution that federal excise taxes be uniform throughout the United States).

Similarly, the Interstate Compact Clause prevents States from exercising the sovereign power to enter into compacts with one another without the consent of Congress, see U.S. Const. Art I, § 10, Cl. 3. When Congress has consented to such compacts, however, States implement them as an exercise of state power, not delegated federal power. See *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 398-400 (1979) (action of agency formed under congressionally approved interstate compact was state action under 42 U.S.C. 1983). And, when Congress authorizes States to exercise the otherwise preempted power to prosecute Indians for offenses in Indian country, a State exercises its own sovereign power in doing so, not delegated federal power. See *State* v. *Marek*, 736 P.2d 1314, 1319 (Idaho 1987).

So, too, although a nation that has been made a territory or possession of the United States may be precluded from exercising any sovereign powers, Congress may restore the nation's sovereignty in full or recognize sovereignty that did not previously exist. See, *e.g.*, 22 U.S.C. 1394 (providing for the United States to "withdraw and surrender all right of possession, supervision, jurisdiction, control, or sovereignty" over the Philippines and to "recognize the independence of the Philippine Islands as a separate and self-governing nation"); Proclamation No. 2695, 60 Stat. 1352. Surely, if Congress can restore all aspects of a previously divested sovereignty to foreign nations, Congress can restore one aspect of a previously divested sovereignty to Indian Tribes, when the power is one that Tribes traditionally exercised after ratification of the Constitution, that is exercised against those who have

consented to tribal membership, and that is exercised subject to constraints that serve to protect individual liberties. See pp. 39-43, *infra*.

* * * * *

In sum, Congress has plenary authority to restore to Tribes a sovereign power that was divested by virtue of their dependent status. Congress can do so without transforming Tribes into instrumentalities of the United States.

D. Congress's Recognition Of The Tribal Sovereign Power To Prosecute Non-Member Indians Does Not Violate The Due Process Clause Of The Fifth Amendment

The Due Process Clause of the Fifth Amendment, including its equal protection component, does not bar Congress from restoring Tribes' criminal jurisdiction over members of other Tribes. Congress may single out tribal Indians for distinct benefits or burdens so long as it has a rational basis for doing so. Congress ensured that criminal defendants in tribal court are entitled under the Indian Civil Rights Act to most of the same protections to which criminal defendants in federal and state court are entitled under the Constitution. See 25 U.S.C. 1302. If a particular tribal prosecution of a non-member Indian raises due process or equal protection concerns, such concerns are properly raised in that prosecution or on federal habeas review. The mere possibility that a denial of federal rights could occur in a tribal prosecution provides no basis to invalidate the post-*Duro* amendment to Section 1301(2) as a facial matter.

1. Congress may legislate distinct rules governing Tribes and tribal members, and Congress validly did so in amended Section 1301(2)

a. This Court has consistently upheld against equal protection challenges Acts of Congress that treat tribally affiliated Indians, as a group, differently from other persons. See, *e.g.*, *United States* v. *Antelope*, 430 U.S. 641 (1977); *Fisher* v. *District Court*, 424 U.S. 382 (1976) (per curiam); *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 479-480 (1976); *Morton* v. *Mancari*, 417 U.S. at 555; see also *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979) (treaty).

As the Court has explained, such laws are based not on "impermissible racial classifications," but on "the unique status of Indians as 'a separate people' with their own political institutions." *Antelope*, 430 U.S. at 646-647. Indeed, in contrast to "immutable characteristic[s]" such as race, sex, and national origin that are "determined solely by the accident of birth," *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (opinion of Brennan, J.), tribal membership is purely voluntary, and it may be relinquished at any time. See *Duro*, 495 U.S. at 694. Accordingly, the Court has stated that such laws withstand equal protection scrutiny "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton* v. *Mancari*, 417 U.S. at 555.

The same standard applies whether an Act of Congress singles out tribal members for distinct benefits or distinct burdens. In *Antelope*, for example, the Court upheld 18 U.S.C. 1153, which subjects Indians, but not non-Indians, to federal prosecution for certain offenses committed in Indian country. The Court rejected the

Indian defendants' contention that their federal convictions "were unlawful as products of invidious racial discrimination," because federal law, in contrast to the state law applicable to non-Indians, did not require premeditation and deliberation as an element of first-degree murder. 430 U.S. at 644. The Court explained that Section 1153, like other federal laws that treat Indians differently from non-Indians, must be analyzed under the rational basis standard applicable to non-suspect classifications, and that the Indian defendants did not seriously contend that the statute failed to satisfy that standard. *Id.* at 647 n.8.

Similarly, in *Fisher*, the Court held that the Northern Cheyenne Tribal Court, acting pursuant to tribal ordinances authorized by the Indian Reorganization Act, 25 U.S.C. 476, could exercise exclusive jurisdiction over child custody disputes involving tribal members residing on the reservation. The Court concluded that denying tribal members access to the state court forum available to non-Indians did not "constitute impermissible racial discrimination," explaining that "such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government." 424 U.S. at 390-391.

b. The recognition of Tribes' criminal jurisdiction over members of other Tribes in 25 U.S.C. 1301(2) is rationally tied to the fulfillment of Congress's obligations toward Indians in two respects.

First, Section 1301(2) advances "the congressional policy of Indian self-government," *Fisher*, 424 U.S. at 390-391, by enhancing the authority of tribal laws and tribal institutions. It enables a Tribe to enforce its criminal laws not only against its own members, but also against members of other Tribes who voluntarily

enter its territory. As the Senate Select Committee on Indian Affairs recognized, a Tribe's exercise of criminal jurisdiction over all such Indians comports with "the reality and practice of reservation life," in which "non-tribal member Indians own homes and property on reservations," "are part of the labor force on the reservation," "frequently are married to tribal members," and "receive the benefits of programs and services provided by the tribal government" to all Indians. S. Rep. No. 168, *supra*, at 6-7. Although practices vary, non-member Indians often play a significant role in tribal affairs, including through employment by the tribal government or service as a juror in tribal court.[12]

Second, Section 1301(2) protects Indians, as well as others who reside in or visit Indian country, against lawlessness by non-member Indians. See *Duro*, 495 U.S. at 696 (observing that "the protection of the [reservation] community from disturbances of the peace

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[12] See, *e.g.*, *Impact of the Supreme Court's Ruling in* Duro *v.* Reina*: Hearing Before the Senate Select Comm. on Indian Affairs*, 102d Cong., 1st Sess. Pt. 1, at 39 (1991) (*Senate Hearing 1*) (statement of Tom Tso, Chief Judge, Navajo Supreme Court) (noting that non-member Indians and non-Indians are permitted to serve as jurors in Navajo courts); *id.* at 45 (statement of Michael Zunie, Chief Judge, Zuni Tribal Court) (noting that non-member Indians and non-Indians are permitted to serve as jurors in Zuni courts); *Senate Hearing 2*, at 44 (statement of Dale Kohler, Chairman of Law and Justice, Colville Tribal Business Council) (noting that non-member Indians serve on Colville Tribe boards and commissions); *id.* at 55 (statement of Harry Smiskin, Tribal Council Member, Yakima Indian Nation) (noting that non-member Indians work for the Yakima Nation or for federal agencies on the reservation); *id.* at 151 (statement of Donald W. Johnson, Chairman, Makah Indian Tribe) (noting that Makah tribal law permits non-member Indians to serve as judges, counsel, or jurors in tribal court).

and other misdemeanors is a most serious matter"). As Members of Congress recognized, because neither the United States nor often the State has jurisdiction to prosecute misdemeanor offenses committed by one Indian against another in Indian country, a "jurisdictional void" would otherwise exist when such offenses were committed by non-member Indians. S. Rep. No. 168, *supra*, at 4. Members of Congress also recognized that, even aside from questions of criminal jurisdiction, the United States or a State might lack the resources to prosecute misdemeanors by non-member Indians. For example, the Senate Select Committee on Indian Affairs found that, after *Duro*, "U.S. Attorneys, already overburdened with the prosecution of major crimes, could not assume the caseload of criminal misdemeanors referred from tribal courts for prosecution of non-member Indians." *Ibid.* The Committee also found that, even in Public Law 280 States, "state law enforcement officers refused to exercise jurisdiction over criminal misdemeanors committed by Indians against Indians on reservation lands." *Ibid.*; see *id.* at 4-5 (noting that the legislatures of five western States had called upon Congress to restore Tribes' criminal jurisdiction over non- member Indians).

Accordingly, Congress's choice to treat all tribal members differently from all other persons with regard to criminal jurisdiction serves the interests of Tribes and their members as a class by advancing tribal self-government and protecting the safety of the reservation community. That choice does not violate the Constitution's equal protection guarantee.

2. Tribal prosecution of non-member Indians under amended Section 1301(2) does not infringe due process rights

Although the Court recognized in *Duro* that the fact "[t]hat Indians are citizens does not alter the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits," the Court declined "[i]n the absence of such legislation" to recognize an inherent tribal power to prosecute non-member Indians, invoking "our Nation's 'great solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty.'" 495 U.S. at 692 (quoting *Oliphant*, 435 U.S. at 210). The concerns that counseled against judicial recognition of that power in *Duro* do not preclude congressional recognition of that power in amended Section 1301(2).

Congress could reasonably conclude that non-member Indians' personal liberties are, as a general matter, adequately protected in a tribal prosecution—and that, in the event that some fundamental liberty is denied in a particular case, relief can be sought on federal habeas review. The Indian Civil Rights Act guarantees protections to criminal defendants in tribal court that are, for the most part, analogous to the protections that the Constitution guarantees to criminal defendants in federal and state court. The Indian Civil Rights Act includes most of the specific protections of the Fourth, Fifth, Sixth, and Eighth Amendments, as well as more general protections against denial of equal protection of tribal law and deprivation of liberty or property without due process of law. See 25 U.S.C. 1302; see also H.R. Rep. No. 61, *supra*, at 6 (describing the Indian Civil Rights Act as establishing "standards

comparable to the Constitution to regulate tribal actions").[13]

Although some rights guaranteed by the Constitution, most notably here the right to appointed counsel, are not guaranteed by the Indian Civil Rights Act, many tribal prosecutions do not implicate those rights or are, in any event, conducted consistently with them. At the 1991 hearings on the post-*Duro* legislation, Congress was informed that 24% of Tribes then provided counsel for indigent criminal defendants in tribal court, and that 46% provided either counsel or trained lay advocates. *Impact of the Supreme Court's Ruling in* Duro *v.* Reina*: Hearing Before the Senate Select Comm. on Indian Affairs*, 102d Cong., 1st Sess. Pt. 2, at 218 (1991) (*Senate Hearing 2*); see also, *e.g.*, 137 Cong. Rec. at 9445 (statement of Senator Inouye) ("[F]ree counsel is provided to indigent defendants by the Ute court and by many tribal courts elsewhere."); *House Hearing* 177 (statement of Donna M. Christensen, Attorney General, Navajo Nation) (noting that the Navajo Bill of Rights requires appointment of counsel

[13] Although the Court expressed reluctance in *Duro* judicially to "single out [a] group of citizens, nonmember Indians, for trial by political bodies that do not include them," 495 U.S. at 693, Congress was informed that non-member Indians, although not entitled to vote in tribal elections, may play an active role in tribal affairs. See p. 37 & note 12, *supra*. It is commonplace, morever, for a State to exercise criminal jurisdiction over persons who are not citizens of the State (or perhaps even of the United States), and who therefore cannot vote in its elections, serve on juries, or hold public office. See *Foley* v. *Connelie*, 435 U.S. 291, 296 (1978) (non-citizens may be excluded from jury service); *Sugarman* v. *Dougall*, 413 U.S. 634, 647 (1973) (State may exclude non-citizens from holding "important nonelective executive, legislative, and judicial positions," held by "officers who participate directly in the formulation, execution, or review of broad public policy").

for indigent criminal defendants). Congress has since authorized funding for entities that provide legal assistance to such defendants. See Indian Tribal Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, § 103, 114 Stat. 2780, (25 U.S.C. 3663). Alternatively, if a Tribe does not provide counsel for indigent defendants, the tribal court could require the prosecutor to forgo seeking incarceration, as is constitutionally permissible in state court. See *Argersinger* v. *Hamlin*, 407 U.S. 25, 40 (1972).[14]

A criminal defendant who claims to have been denied a right in tribal court to which he was entitled under the Indian Civil Rights Act or the Constitution may seek relief in the tribal court system in the first instance. See *Senate Hearing 2*, at 218 (noting that 97% of tribal court systems provided a right of appeal in

[14] It is not a foregone conclusion that, even in tribal prosecutions in which incarceration is sought, the due process protections of the Indian Civil Rights Act or the Constitution require the appointment of counsel for indigent non-member Indians. A Tribe's prosecution of its own members without appointment of counsel "is accepted by [this Court's] precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent." *Duro*, 495 U.S. at 694. Sufficient consent to proceed without appointed counsel might be found in a defendant's choice to retain membership in his own Tribe, coupled in many circumtances with his choice to reside among another Tribe and to accept the services that it provides to all Indians. Moreover, at least when a Tribe employs informal, non-adversarial processes to enforce its criminal laws, the fairness concerns that require the appointment of counsel in federal or state prosecutions may be diminished. Cf. *Gideon* v. *Wainwright*, 372 U.S. 335, 343-345 (1963). In any event, as noted in the text, respondent has not asserted that he sought, but was denied, appointed counsel in the Spirit Lake Nation Tribal Court.

1991); see generally Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 Fordham L. Rev. 479, 529 (2000) (describing tribal court decisions applying the Indian Civil Rights Act as "strongly rights-protective, even if the actual doctrines vary somewhat from ordinary federal case law"). And, if convicted, the defendant may seek federal habeas review "to test the legality of his detention by order of an Indian tribe." 25 U.S.C. 1303; see H.R. Rep. No. 61, *supra*, at 6 (explaining that federal habeas review under Section 1303 provides "a remedy for violations of basic fairness" in tribal prosecutions).

There is thus no reason to assume that any non-member Indian would be convicted and punished by a Tribe after a prosecution that denied him any fundamental right. Nor do the few reported cases seeking federal habeas relief from tribal convictions reveal that such rights are being violated by Tribes. See *Senate Hearing 2*, at 30, 33-34 (statement of Sen. Inouye) (noting the absence of any complaints to the Senate Select Committee on Indian Affairs about violations of the Indian Civil Rights Act in tribal judicial systems). The mere possibility that such a case might arise does not deprive Congress of the power to authorize Tribes to exercise criminal jurisdiction over non-member Indians or invalidate amended Section 1301(2) as a facial matter.

Here, respondent did not raise any claim in his tribal prosecution of the denial of any right guaranteed him by the Indian Civil Rights Act or the Constitution. Nor did he seek federal habeas review of his tribal conviction under Section 1303. Although respondent now asserts that his "individual rights * * * are implicated

by his prosecution by a sovereign which does not afford him his constitutional rights" (Br. in Opp. 6), respondent has not identified any specific constitutional right that was denied him or otherwise challenged the validity of his tribal prosecution. As in *Mazurie*, the Court should decline the invitation to hold that an Act of Congress authorizing an exercise of tribal power is unconstitutional, merely because a Tribe might exercise that power in a different case in a manner that would deprive other persons of due process or equal protection. See 419 U.S. at 558 n.12.

II. THE DOUBLE JEOPARDY CLAUSE WOULD NOT BAR THE UNITED STATES FROM PROSECUTING RESPONDENT, EVEN IF CONGRESS COULD NOT CONSTITUTIONALLY RESTORE THE TRIBE'S POWER TO PROSECUTE HIM

The United States would not be barred by the Double Jeopardy Clause from prosecuting respondent even if, contrary to the discussion above, Congress could not constitutionally restore Tribes' sovereign power to prosecute non-member Indians. That is because jeopardy would not have attached in respondent's tribal prosecution.

This Court has deemed it "indisputable" that "before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged." *Grafton* v. *United States*, 206 U.S. 333, 345 (1907); see *Serfass* v. *United States*, 420 U.S. 377, 391 (1975) ("[T]he Double Jeopardy Clause * * * does not come into play until a proceeding begins before a trier having jurisdiction to try the question of the guilt or innocence of the accused.") (internal quotation marks omitted); *Kepner* v. *United States*, 195 U.S. 100, 129

(1904) ("An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense."); *United States* v. *Ball*, 163 U.S. 662, 669 (1896) (same).

Accordingly, in *United States* v. *Phelps*, 168 F.3d 1048, 1054-1055 (8th Cir. 1999), the court of appeals rejected a non-Indian defendant's double jeopardy challenge to his federal prosecution, which followed his tribal prosecution for an offense with the same elements. The court explained that, because the Tribe lacked criminal jurisdiction over the defendant, jeopardy did not attach in the tribal prosecution. *Id.* at 1054; cf. 2 Op. Att'y Gen. 693 (1834) (concluding that a Choctaw court had acted without jurisdiction in trying a non-Indian defendant for murder and that the defendant should be tried for the murder in the United States territorial court).

Here, as well, if Congress's post-*Duro* amendment to Section 1301(2) could not validly restore Tribes' criminal jurisdiction over members of other Tribes, the Spirit Lake Nation's prosecution of respondent would have been conducted without jurisdiction, and thus would be "absolutely void." *Kepner*, 195 U.S. at 129. The tribal prosecution could not, therefore, operate to bar respondent's subsequent prosecution by the United States.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. Section 1301 of Title 25 of the United States Code provides:

For purposes of this subchapter, the term—

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self- government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;

(3) "Indian court" means any Indian tribal court or court of Indian offense; and

(4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

2. Section 1302 of Title 25 of the United States Code provides:

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people

peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and* a fine of $5,000, or both;

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* So in original. Probably should be "or".

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

3. Section 1303 of Title 25 of the United States Code provides:

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

(5)

Supreme Court, U.S.
FILED
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NO. 03-107

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,

Petitioner,

v.

BILLY JO LARA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE STATES OF WASHINGTON, ARIZONA, CALIFORNIA, COLORADO, MICHIGAN, MONTANA, NEW MEXICO, AND OREGON AS AMICI CURIAE SUPPORTING PETITIONER

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TABLE OF CONTENTS

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

FACTUAL SETTING 2

1. Historically And Today Indian Communities And Reservations Have Been Composed Of Indians From Various Tribes 2

2. Community Law Enforcement Benefits From The Amendments to 25 U.S.C. § 1301 5

ARGUMENT 8

Congress Validly Exercised Its Plenary Power Over Indian Tribes To Restore Tribal Jurisdiction Over Non-member Indians 8

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Confederated Tribes of Chehalis Indian Reservation v. Washington
96 F.3d 334 (9th Cir. 1996),
cert. denied, 520 U.S. 1168 (1997) 3

Devils Lake Sioux Indian Tribe v. North Dakota Pub. Serv. Comm'n
896 F. Supp. 955 (D.N.D. 1995) 11

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154 F.3d 941 (9th Cir. 1998) 6

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262 F.3d 732 (8th Cir. 2001),
cert. denied, 535 U.S. 988 (2002) 11

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324 F.3d 635 (8th Cir. 2003) 8, 9

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36 F. Supp. 2d 908 (D. Neb. 1997) 6

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Fifth Amendment 2, 8, 15

Statutes

18 U.S.C. § 1152 7

25 U.S.C. § 13 4

25 U.S.C. § 1301 ..... *passim*

25 U.S.C. § 1301(2) 9

25 U.S.C. § 1301(4) 9

25 U.S.C. § 1603(c) 4

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Act of Feb. 16, 1863, 37th Cong., ch. 37 12

Pub. L. No. 101-511, § 8077(b)-(d), 104 Stat. 1856, 1892-93 (1990) 9

N.M. Stat. § 29-1-11 6

Regulations

25 C.F.R. § 27.1 4

Treaties

Treaty With Nisqualli, Puyallup, etc., 1854 (Treaty of Medicine Creek), 10 Stat. 1132 (Dec. 26, 1854) 13

Treaty With the Blackfeet, 1855, 11 Stat. 657 (Oct. 17, 1855) 14

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Treaty With the Dwámish Indians (Treaty of Point Elliott), 12 Stat. 927 (Jan. 22, 1855) 13

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(http://www.ncjrs.org/pdffiles1/nij/188095.pdf) 6

Rules

Rule 37.4 1

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H.R. Rep. No. 101-938 (1990) 5, 9

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BRIEF FOR THE STATES OF WASHINGTON, ARIZONA, CALIFORNIA, COLORADO, MICHIGAN, MONTANA, NEW MEXICO, AND OREGON AS AMICI CURIAE SUPPORTING PETITIONER

Pursuant to Rule 37.4, Washington and the other amici curiae states respectfully submit this brief in support of petitioner, the United States, to urge that the judgment of the en banc panel of the Eighth Circuit below be reversed.

INTEREST OF THE AMICI CURIAE

The amici curiae states all have Indian reservations within their geographic boundaries. All partner in various ways with the tribal governments as well as with the federal government to provide effective law enforcement services for their citizens, Indian and non-Indian, in Indian Country. All are vitally interested in assuring the public health and safety of their citizens, and in protecting the law enforcement infrastructure built of the three sovereign entities in Indian Country: the United States, the Tribes, and the States and their local governmental subdivisions.

SUMMARY OF ARGUMENT

This case presents the question whether Congressional legislation admittedly intended to change the results of this Court's opinion in *Duro v. Reina*, 495 U.S. 676 (1990), is a valid affirmation and restoration of inherent tribal powers. The amici curiae states assert that 25 U.S.C. § 1301 as amended, is a valid exercise of Congressional

authority to restore Tribal authority to prosecute members of other Tribes, and that therefore the double jeopardy clause of the Fifth Amendment to the United States Constitution prohibiting a successive prosecution by the same sovereign is inapplicable herein.

FACTUAL SETTING

1. Historically And Today Indian Communities And Reservations Have Been Composed Of Indians From Various Tribes

Indian tribes are not now, nor have they ever been, uniform homogeneous communities. Historically, Indian villages often consisted of fairly diverse combinations of Indians from various tribes and tribal groupings. Often these diverse communities were the result of marital and kinship relationships. Many Northwest tribes encouraged marriage with a member of another village. *See United States v. Washington*, 384 F. Supp. 312, 370, 380 (W.D. Wash. 1974).

Nineteenth-century federal policies and laws accentuated the diversity of tribal communities. During the nineteenth century, the United States set aside many parcels of land as reservations for Indians. Though some Tribes secured reservations in their traditional homelands, many did not. Instead, they were consolidated with other tribal groups on reservations created as a matter of geographic happenstance and federal convenience. Many Reservations were and are today home to confederations of numerous bands and groups of Indian people. *See, e.g., Washington*, 384 F. Supp. at

366 (numerous bands consolidated on Muckleshoot Indian Reservation); Treaty With the Yakama Nation of Indians, 12 Stat. 951, art. III (June 9, 1855, ratified Mar. 8, 1859; proclaimed Apr. 18, 1859) (reservation for 14 tribes and bands).

In addition, many treaties and other instruments also provided for the later inclusion and accommodation of groups or individual Indians not previously located on Reservations. *See, e.g.*, Treaty With the Qui-Nai-Elt and Quil-leh-ute Indians (Treaty of Olympia, Jan. 25, 1856), 12 Stat. 971, art. VIII (July 1, 1855; ratified Mar. 8, 1859; proclaimed Apr. 11, 1859); Treaty With the Flathead, Kootenay, and Upper Pend d'Oreilles Indians (Treaty of Hell Gate), 12 Stat. 975, art. II (July 16, 1855; ratified Mar. 8, 1859; proclaimed Apr. 18, 1859); Treaty With the Eastern Band of Shoshonees and the Bannack Tribe of Indians, 15 Stat. 673, art. II (July 3, 1868; ratification advised Feb. 16, 1869; proclaimed Feb. 24, 1869); I Charles J. Kappler, Indian Affairs: Laws and Treaties 916 (1904) (Executive Order of July 2, 1872 establishing Colville Indian Reservation). In still other instances, Indians from the same tribe settled on more than one reservation. *See, e.g., Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 338-39 (9th Cir. 1996) (Chehalis Indians settled on Chehalis and Quinault Reservations), *cert. denied*, 520 U.S. 1168 (1997); *United States v. Oregon*, 787 F. Supp. 1557, 1576-77 (D. Or. 1992) (Nez Perce Indians settled on Nez Perce and Colville Reservations); *id.* at 1579 (members of several historical bands settled on Yakama and Colville Reservations). Indeed, one of the treaties involved in this case created two

reservations for the signatory Indians. Treaty With the Sissiton and Warpeton Bands of Dakota or Sioux Indians, 1867, 15 Stat. 505, art. III, art. IV (Feb. 19, 1867; ratification advised, with Amendments, Apr. 15, 1867; Amendments accepted Apr. 22, 1867; proclaimed May 2, 1867).

So it is that, today, members of extended families may live within more than one Indian reservation. It is common for persons enrolled in one tribe to live within the reservation of another, and for family members who live together to be enrolled in different tribes.

The results of a 1991 survey conducted by the National Congress of American Indians revealed that nearly twelve percent of Indians living in reservation communities were not members of the local or host tribe(s). S. Rep. No. 102-68, App. E at 58 (1991). Moreover, 80% of the tribes responding to the survey indicated that non-member Indians were married to tribal members and 92% of the responding tribes reported that the non-member Indians worked on their reservations. *Id.* Such diversity is encouraged by current federal policies and practices that provide many federal benefits and services to members of Indian tribes regardless of where they reside. *See, e.g.*, 25 U.S.C. § 13 (Bureau of Indian Affairs authority to expend money for the benefit of Indians); 25 U.S.C. § 309 (vocational training for Indians); 25 C.F.R. § 27.1 (definition of "Indian" for vocational training); 25 U.S.C. § 1603(c) (definition of "Indian" for health care services);

25 U.S.C. § 472 (Bureau of Indian Affairs employment preference for Indians).[1]

2. Community Law Enforcement Benefits From The Amendments to 25 U.S.C. § 1301

In enacting the Indian Civil Rights Act Amendment at issue in this case, Congress recognized that tribal governments afford a broad array of services to non-member Indians. Congress recognized that non-member Indians often own property on the host reservation, their children attend tribal schools, and families receive health care from tribally-operated hospitals and clinics. S. Rep. No. 102-68, at 6-7 (1991). Congress also recognized that federally-administered programs and services are provided to non-member Indians because of their status as Indians, without regard to whether they are a member of the tribe on whose reservation they reside. H.R. Rep. No. 101-938, at 133 (1990).

According to the 1991 survey conducted by the National Congress of American Indians, disorderly conduct, assault/battery, intoxication, and driving while intoxicated were the most common types of criminal activity reported on Reservations. S. Rep. No. 102-68, at 59 (1991). In addition, the facts underlying many of the federal cases in this area of jurisprudence reveal that assault/battery on family

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[1] Some federal benefits are available to members of any tribe, regardless of place of residency. Because all tribal members have a relationship through their Tribes with the federal government, special legislation for Indians, including the amendment to 25 U.S.C. § 1301 at issue here, is a political, not a racial classification. *See Morton v. Mancari*, 417 U.S. 535, 551-52 (1974).

members or partners is an unfortunate, recurrent theme. *United States v. Archambault*, 174 F. Supp. 2d 1009 (D.S.D. 2001); *United States v. Weaselhead*, 36 F. Supp. 2d 908 (D. Neb. 1997), *subsequent history omitted; Means v. Northern Cheyenne Tribal Court*, 154 F.3d 941 (9th Cir. 1998).

These community and family crimes often lend themselves best to "community policing". Community Policing is "a method by which communities lend their authority to the police enterprise, see their norms and values reflected in the police mission, and employ their considerable formal and informal resources to address crime". U.S. Dep't Of Justice, Research Report, *Policing On American Indian Reservations* ix (July 2001) (http://www.ncjrs.org/pdffiles1/nij/188095.pdf). This "gives rise to law enforcement institutions that have the characteristics [of] self determination and cultural appropriateness, and such institutions have the potential to substantially improve public safety". *Id.* Even where state or federal law enforcement authorities have the authority and resources to arrest and try non-member Indians, they have less intimate knowledge of local cultural norms than do Tribal law enforcement authorities. Thus, current concepts of "community policing" would suggest that in some cases Tribal law enforcement may be better positioned to carry it out.

The Amici States have been working with the Tribes in their respective states to strengthen cooperative relationships between Tribal and State governments, particularly in the area of law enforcement. *See, e.g.*, N.M. Stat. § 29-1-11 (authorization of tribal and pueblo police officers to

act as New Mexico peace officers).[2] It is the belief of these states and tribal governments that cooperative and mutually respectful law enforcement efforts will benefit our communities, both individually and collectively. In this age of diminishing resources and increasing law enforcement challenges, agreements and protocols that maximize the collective effectiveness of tribal, state, and federal law enforcement efforts are essential. Whether by reason of proximity, knowledge of custom and culture, resources, legal authority, and appropriateness of possible sanction, one law enforcement agency (whether it be tribal, federal, or state) may be better positioned to take enforcement action than another. All the cooperative agreements and protocols, however, cannot fill the void if none of the agencies possesses the authority to arrest and prosecute.

Should this Court determine that Congress' effort to restore inherent sovereignty over non-member Indians is invalid, it will reopen a jurisdictional gap, where no government will have jurisdiction over misdemeanors committed by non-member Indians in Indian country. While this Court has held that the Assimilative Crimes Act applies to Indian country through 18 U.S.C. § 1152 (The General Crimes Act), which excepts Indian versus Indian crimes from its purview, the Assimilative Crimes Act likely does not apply of its own force. *See Williams v. United States*, 327 U.S. 711, 714

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[2] Copies of many cooperative law enforcement agreements are posted on the internet web site of the National Congress of American Indians, http://www.ncai.org/main/pages/issues/governance/agreements/law_enforcement_agreements.asp.

n.3 (1946). In *Duro v. Reina*, 495 U.S. 676 (1990), this Court noted: "And federal authority over minor crime, otherwise provided by the Indian Country Crimes Act, 18 U.S.C. § 1152, may be lacking altogether in the case of crime committed by a non-member Indian against another Indian, since § 1152 states that general federal jurisdiction over Indian country crime 'shall not extend to offenses committed by one Indian against the person or property of another Indian.'" *Duro*, 495 U.S. at 697. *See* Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 505 (1976). It is not in the interest of tribal or state law enforcement to have such a gap develop and result in lawlessness.

ARGUMENT

Congress Validly Exercised Its Plenary Power Over Indian Tribes To Restore Tribal Jurisdiction Over Non-member Indians

This case arose after the Spirit Lake Nation prosecuted Billy Jo Lara, a member of another Indian Tribe, concerning an incident that occurred within the boundaries of the Spirit Lake Nation Reservation. When the United States attempted to prosecute Mr. Lara for the same conduct, the Eighth Circuit held that the prosecution was barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. *United States v. Lara*, 324 F.3d 635 (8th Cir. 2003).

The Spirit Lake Nation prosecuted Mr. Lara in accordance with the 1990 and 1991 amendments to 25 U.S.C. § 1301, which Congress enacted in response to this Court's decision in *Duro*. The

Eighth Circuit said the amendments were ineffective because *Duro* was a constitutional holding, which Congress lacked power to overrule. *Lara*, 324 F.3d at 639. The Eighth Circuit erred in drawing that conclusion.

In *Duro*, this Court held that the inherent sovereignty then retained by Indian Tribes did not include the power to prosecute non-member Indians. In its analysis, the Court recognized, however, that tribal powers with respect to non-member Indians were not static, but had evolved over time with changing congressional policies, such as those embodied in the 1924 act granting United States citizenship to Indians. *Duro*, 495 U.S. at 688-93; *see id.* at 706 (describing majority as having concluded "tribes were implicitly divested of this power in 1924 when Indians became full citizens") (Brennan, J., dissenting). The Court recognized that Indian citizenship "does not alter the Federal Government's broad authority to legislate with respect to enrolled Indians as a class", but noted that Congress had not done so with respect to criminal punishment of one tribe's members by another tribe. *Id.* at 692, 693.

Congress responded by enacting the amendments at issue in this case.[3] Certainly

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[3] Pub. L. No. 101-511, § 8077(b)-(d), 104 Stat. 1856, 1892-93 (1990); *see* H.R. Rep. No. 101-938, at. 133 (1990) (made permanent by Pub. L. No. 102-137, § 1, 105 Stat. 646 (1991), codified at 25 U.S.C. § 1301(2), (4)). The amendments amended the definition of "powers of self-government", in 25 U.S.C. § 1301(2), to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians" and defined the term "Indian", in 25 U.S.C. § 1301(4), to mean "any person who would be subject to the

Congress cannot exercise powers reserved exclusively to the judiciary. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803). Congress cannot, for example, declare to be constitutional a law that the Court has said is not. *See id.* But that is not what Congress did.

In enacting the 1990 and 1991 amendments to 25 U.S.C. § 1301, Congress validly restored Tribes' sovereign power to prosecute non-member Indians. The enactment has the effect of amending treaties, other laws, and federal common law that expressly or impliedly withdrew tribes' power to prosecute non-member Indians.

The Constitution is not the principal basis for this Court's Indian law jurisprudence. As this Court observed in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978), "'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress". *Cf. McClanahan v. Tax Comm'n of Arizona*, 411 U.S. 164, 172 (1973) (in the area of state-tribal relations, "modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power"); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 474 n.13 (1976) (analysis of state power to tax Indians depends not on constitutional "federal-instrumentality doctrine," but on "applicable treaties and federal legislation"). In

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jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies".

Duro, this Court drew from non-constitutional sources, including statutes and treaties, to conclude that a constellation of federal laws had withdrawn Indian tribes' power to prosecute non-member Indians. *See Duro*, 495 U.S. at 688-92. The dissent drew the opposite conclusion from the same federal laws. *Id.* at 700-06. Though Congress, as the Eighth Circuit properly concluded, does not have the power to overrule this Court's construction of the United States Constitution, it does have the power to amend statutes and treaties like those that formed the backdrop for this Court's holding in *Duro* that help to define the inherent powers of Indian tribes. That is what Congress did when it enacted the 1990 and 1991 amendments to 25 U.S.C. § 1301.

Among other things, the 1990 and 1991 legislation can be viewed as having the effect of amending a treaty to which the Spirit Lake Nation is a party.

The Spirit Lake Nation Reservation, where Mr. Lara was prosecuted, was created by Article IV of the Treaty With the Sissiton and Warpeton Bands of Dakota or Sioux Indians, 1867, 15 Stat. 505, 506 (Feb. 19, 1867; ratification advised, with Amendments, Apr. 15, 1867; Amendments accepted Apr. 22, 1867; proclaimed May 2, 1867). *See generally Spirit Lake Tribe v. North Dakota*, 262 F.3d 732 (8th Cir. 2001), *cert. denied*, 535 U.S. 988 (2002); *Devils Lake Sioux Indian Tribe v. North Dakota Pub. Serv. Comm'n*, 896 F. Supp. 955 (D.N.D. 1995). The Indian bands who executed the 1867 treaty also executed two earlier treaties with the United States, in 1851 and 1858. Treaty With the Sioux – Sisseton and Wahpeton Bands, 1851, 10

Stat. 949 (July 23, 1851); Treaty With the Sisseeton and Wahpaton Bands of the Dakota or Sioux Tribe of Indians, 1858, 12 Stat. 1037 (June 19, 1858; ratified Mar. 9, 1859; proclaimed Mar. 31, 1859). *See generally* Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* 199-200, 269, 276 (1994). In Article VI of the 1858 Treaty, the Sisseton and Warpeton Bands acknowledged as follows:

> "The Sisseeton and Wahpaton bands of Dakota or Sioux Indians . . . pledge themselves not to engage in hostilities with the Indians of any other tribe, unless in self-defence, but to *submit, through their agent, all matters of dispute and difficulty between themselves and other Indians for the decision of the President of the United States, and to acquiesce in and abide thereby.* They also agree to deliver to the proper officers all persons belonging to their said bands who may become offenders against the treaties, laws, or regulations of the United States, or the laws of the State of Minnesota, and to assist in discovering, pursuing, and capturing all such offenders whenever required so to do by such officers, through the agent or other proper officer of the Indian department." 12 Stat. 1037, art. VI (emphasis added).

In 1863, following hostilities in 1862 between Indians and settlers, Congress annulled some portions of the 1858 treaty. Act of Feb. 16, 1863, 37th Cong., ch. 37 at 652-54. The 1863 act did not change Article VI of the 1858 Treaty, however.

Some of the tribal signatories to the 1858 Treaty did not participate in the 1862 hostilities. In the 1867 Treaty, the United States recognized their loyalty and created two new reservations for them, including the Spirit Lake Nation Reservation where Mr. Lara was prosecuted. The 1867 Treaty did not change Article VI of the 1858 Treaty.

Article VI of the 1858 Treaty with the Sisseeton Sioux was not unusual. Provisions in which Indians agreed to submit differences between themselves and members of other tribes for decision by the United States government were common features in Indian treaties of the nineteenth century. *See* Karl Jeffrey Erhart, Comment, *Jurisdiction Over Nonmember Indians on Reservations*, 1980 Ariz. S.L.J. 727, 737-41 (1980). For example, more than two dozen tribes in the Pacific Northwest are parties to treaties with such provisions.[4]

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[4] *See* Treaty With Nisqualli, Puyallup, etc., 1854 (Treaty of Medicine Creek), 10 Stat. 1132, art. VIII (Dec. 26, 1854); Treaty With the Dwámish Indians (Treaty of Point Elliott), 12 Stat. 927, art. IX (Jan. 22, 1855); Treaty With the S'Klallams Indians (Treaty of Point No Point), 12 Stat. 933, art. IX (Jan. 26, 1855; ratified Mar. 8, 1859; proclaimed Apr. 29, 1859); Treaty With the Makah Tribe of Indians (Treaty of Neah Bay), 12 Stat. 939, art. IX (Jan. 31, 1855; ratified Mar. 8, 1859; proclaimed Apr. 18, 1859); Treaty With the Walla-Walla, Cayuses, and Umatilla Tribes and Bands of Indians, 12 Stat. 945, art. VIII (June 9, 1855; ratified Mar. 8, 1859; proclaimed Apr. 11, 1859); Treaty With the Yakama Nation of Indians, 12 Stat. 951, art. VII (June 9, 1855, ratified Mar. 8, 1859; proclaimed Apr. 18, 1859); Treaty With the Nez Percé Indians, 12 Stat. 957, art. VIII (June 11, 1855; ratified Mar. 8, 1859; proclaimed Apr. 29, 1859); Treaty With the Confederated Tribes and Bands of Indians in Middle Oregon, 12 Stat. 963, art. VII (June 25, 1855; ratified Mar. 8, 1859; proclaimed Apr. 18, 1859);

These treaties, as well as other laws, formed the backdrop for the Court's holding in *Duro* that Tribes then lacked inherent sovereignty to prosecute non-member Indians. *See Duro*, 495 U.S. at 690. Congress unquestionably has the power to amend treaty provisions such as Article VI of the 1858 Treaty With the Sisseeton Sioux. *United States v. Dion*, 476 U.S. 734, 738 (1986). Congress has the power to restore inherent tribal powers previously withdrawn by treaty or statute. *See United States v. Long*, 324 F.3d 475, 479-83 (7th Cir. 2003) (tribe that Congress had terminated but later restored possessed inherent criminal jurisdiction over member), *cert denied*, 124 S. Ct. 151 (2003). Congress' restoration of inherent tribal power to punish non-member Indians in the amendments to 25 U.S.C. § 1301 can be viewed as having had that effect.

Because of the amendments to 25 U.S.C. § 1301, the legal landscape of treaties, statutes, and common law is different now from what it was when the Court decided *Duro*. Congress restored inherent tribal powers with respect to non-member Indians with the adoption of the amendments to 25 U.S.C. § 1301. The United States' prosecution of Mr. Lara was a prosecution by a separate sovereign that did

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Treaty With the Flathead, Kootenay, and Upper Pend d'Oreilles Indians (Treaty of Hell Gate), 12 Stat. 975, art. II (July 16, 1855; ratified Mar. 8, 1859; proclaimed Apr. 18, 1859); Treaty With the Qui-Nai-Elt and Quil-leh-ute Indians (Treaty of Olympia, Jan. 25, 1856), 12 Stat. 971, art. VIII (July 1, 1855; ratified Mar. 8, 1859; proclaimed Apr. 11, 1859); Treaty With the Blackfeet, 1855, 11 Stat. 657, art. II (Oct. 17, 1855).

not offend the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

CONCLUSION

For the forgoing reasons, the judgment of the Court of Appeals should be reversed.

RESPECTFULLY SUBMITTED.

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

BILLY JO LARA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
THE CONSTITUTION DOES NOT LIMIT CONGRESS'S POWER TO REMOVE COMMON LAW BARRIERS TO EXERCISES OF TRIBAL SOVEREIGNTY	6
A. The Issue Is The Scope of Congressional Power	6
B. The Constitution Provides Congress With Broad Power To Define The Sovereign Attributes Of Indian Tribes	8
C. The Tribes' Sovereign Power With Respect To Indians And Indian Country Is Governed By Positive Federal Law And Federal Common Law	12
D. The *Duro* Fix Is A Constitutional Exercise Of Congress's Power To Override Federal Common Law Decisions And Reaffirm Tribal Sovereignty	17
E. The Substantial Implications Of A Delegation Of Federal Judicial Power To Tribal Courts Would Be Dramatic, Thereby Demonstrating That *Duro* States A Federal Common Law Rule	24

TABLE OF CONTENTS – continued

Page

CONCLUSION 30

TABLE OF AUTHORITIES

CASES Page

Atherton v. *FDIC*, 519 U.S. 213 (1997) 12
Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 (1964) 14
Barnhart v. *Sigmon Coal Co.*, 534 U.S. 438 (2002) 6
Brendale v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) 13
Bryan v. *Itasca County, Minn.*, 426 U.S. 373 (1976) 17
Buckley v. *Valeo*, 424 U.S. 1 (1976) 27
C&L Enters., Inc. v. *Citizen Band of Potawatomi Indian Tribe*, 532 U.S. 411 (2001) 21
California v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) 14
Cherokee Nation v. *Georgia*, 30 U.S. 1 (1831) 3, 8
City of Milwaukee v. *Illinois*, 451 U.S. 304 (1981) 4, 14
Commodity Futures Trading Comm'n v. *Schor*, 478 U.S. 833 (1986) 26, 27
Cotton Petroleum Corp. v. *New Mexico*, 490 U.S. 163 (1989) 8
Ex parte Crow Dog, 109 U.S. 556 (1883) 9
Delaware Tribal Bus. Comm. v. *Weeks*, 430 U.S. 73 (1977) 4, 11, 20
Duro v. *Reina*, 495 U.S. 676 (1990) ..... *passim*
Freytag v. *Commissioner*, 501 U.S. 868 (1991) 27
Hagen v. *Utah*, 510 U.S. 399 (1994) 10
Heath v. *Alabama*, 474 U.S. 82 (1985) 7
Johnson v. *McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) 8
Kiowa Tribe v. *Manufacturing Techs., Inc.*, 523 U.S. 751 (1998) 29
Lone Wolf v. *Hitchcock*, 187 U.S. 553 (1903) 11

TABLE OF AUTHORITIES – continued

	Page
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982)	13
Montana v. *Blackfeet Tribe of Indians*, 471 U.S. 759 (1985)	19
Morton v. *Mancari*, 417 U.S. 535 (1974)	11
National Farmers Union Ins. Cos. v. *Crow Tribe of Indians*, 471 U.S. 845 (1985)	13
Negonsott v. *Samuels*, 507 U.S. 99 (1993)	24
Nevada v. *Hicks*, 533 U.S. 353 (2001)	13
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978)	15, 16, 29
Oneida Indian Nation v. *County of Oneida, N.Y.*, 414 U.S. 661 (1974)	13
Prudential Ins. Co. v. *Benjamin*, 328 U.S. 408 (1946)	19
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978)	3, 8
South Dakota v. *Yankton Sioux Tribe*, 522 U.S. 329 (1998)	10, 11
Stephens v. *Cherokee Nation*, 174 U.S. 445 (1899)	27
Talton v. *Mayes*, 163 U.S. 376 (1896)	3, 5, 9, 17, 21
United States v. *Holliday*, 70 U.S. (3 Wall.) 407 (1865)	8, 11
United States v. *Long*, 324 F.3d 475 (7th Cir.), *cert. denied*, 124 S. Ct. 151 (2003)	22
United States v. *Mazurie*, 419 U.S. 544 (1975)	8, 17
United States v. *McBratney*, 104 U.S. 621 (1881)	25
United States v. *Sandoval*, 231 U.S. 28 (1913)	20
United States v. *Wheeler*, 435 U.S. 313 (1978)	4, 15, 22
Winters v. *United States*, 207 U.S. 564 (1908)	13
Worcester v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832)	8, 9

TABLE OF AUTHORITIES – continued

CONSTITUTION AND STATUTES	Page
U.S. Const. art. I, § 8, cl. 3	8
art. II, § 2, cl. 2	8, 27
art. III, § 1	26
art. IV, § 3, cl. 2	8
Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (1830)	9
Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388	9
Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984	9, 10
Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588	18
Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975)	9, 10
Act of Nov. 5, 1990, Pub. L. No. 101-511, 104 Stat. 1856	2
18 U.S.C. § 1152	25
§ 1153	25
25 U.S.C. § 450a(b)	10
§ 450f note	28
§ 903a(b)	22
§ 1301(2)	2, 3, 6
§ 1302	2
§ 1303	2
§§ 2701-2721	14
§ 2702	14
28 U.S.C. § 2675(a)	28

REGULATIONS

41 Fed. Reg. 8516 (1976)	18
46 Fed. Reg. 2195 (1981)	18
51 Fed. Reg. 24,234 (1986)	18
52 Fed. Reg. 8372 (1987)	18

TABLE OF AUTHORITIES – continued

	Page
53 Fed. Reg. 5837 (1988)	18
54 Fed. Reg. 19,959 (1989)	18
LEGISLATIVE HISTORY	
H.R. Rep. No. 101-938 (1991)	23
No. 102-61 (1991)	6
H.R. Conf. Rep. No. 102-261 (1991)	7
S. Rep. No. 102-168 (1991)	6, 26
H.R. Cong. Res. 108, 83rd Cong., 67 Stat. B132 (1953)	9
SCHOLARLY AUTHORITIES	
William C. Canby, Jr., *American Indian Law in a Nutshell* (2d ed. 1988)	9
Robert N. Clinton, *Redressing The Legacy Of Conquest: A Vision Quest For A Decolonized Federal Indian Law*, 46 Ark. L. Rev. 77 (1993)	12
Felix S.Cohen, *Handbook of Federal Indian Law* (1982 ed.)	8, 11, 12, 19, 20
Carole E. Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 U.C.L.A. L. Rev. 1405 (1997)	18
Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 Yale L.J. 1 (1999)	9, 10, 20, 22
Charles F. Wilkinson, *American Indians, Time, And The Law* (1987)	12

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian Tribes and Alaskan Native villages.[1] NCAI is dedicated to protecting the rights and improving the welfare of American Indians.

The Court's decision in this case has critically important implications for both tribal self-government and public safety in Indian country. It will decide whether Tribes may act as sovereigns in administering criminal justice for all Indians or whether, as a practical matter, some Indians will effectively become immune from prosecution for certain crimes on reservations. NCAI Tribes have a strong interest in participating in this case because they are responsible for the administration of justice and public safety in Indian country both as a critical attribute of tribal self-government and as an important duty of Tribes exercising their sovereignty.

INTRODUCTION

In *Duro* v. *Reina*, 495 U.S. 676 (1990), based on its review of relevant precedents, history and policy, this Court held that Tribes lack jurisdiction to prosecute Indians who are not members. This Court acknowledged that its holding might create a significant gap in law enforcement in Indian country because neither the federal, the state, nor the tribal government would have authority to prosecute a non-member Indian for certain crimes committed on a reservation. The Court, however, reasoned that Congress, "which has the

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[1] No one other than the NCAI made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

ultimate authority over Indian affairs," was the appropriate institution to address and resolve this problem. *Id.* at 698. Congress responded immediately by enacting an amendment to the Indian Civil Rights Act ("ICRA"), aptly characterized as the "*Duro* fix." See Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892-93 (codified at 25 U.S.C. § 1301(2) & (4)). In terms that admit of no doubt, Congress "recognized and affirmed" the authority of Tribes to exercise criminal jurisdiction over all Indians as an aspect of their sovereign power. See 25 U.S.C. § 1301(2) (defining tribal "'powers of self-government'" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians"). Significantly, Congress also made it clear that all Indian defendants in tribal courts enjoy the civil rights protections embodied in ICRA, as well as the right to habeas corpus review in federal court.[2]

Respondent Billy Jo Lara, however, asserts that Congress lacks the power to authorize his criminal prosecution by the Spirit Lake Nation as an exercise of the Tribe's sovereign power. Lara, a member of the Turtle Mountain Band of Chippewa Indians, claims that the tribal court of the Spirit Lake Nation was acting not as a sovereign, but as an agency of the United States when it convicted him of assaulting a police officer on the Spirit Lake Reservation. Lara therefore sought dismissal of the United States' subsequent prosecution in federal court based on the same incident, on the ground that he had been "twice put in jeopardy of life or limb" for "the

[2] With the exception of the right to appointed counsel and the right to grand jury indictment for a federal charge, the rights that ICRA guarantees to criminal defendants in tribal court are substantially identical to the constitutional rights of criminal defendants in federal and state courts, including the protections of the Fourth, Fifth, Sixth, and Eighth Amendments. *See* 25 U.S.C. § 1302. And, convicted defendants have access to the writ of habeas corpus. *Id.* § 1303. Tribal courts are also limited to imposing punishments of one year's imprisonment and a $5,000 fine. *Id.* § 1302(7).

same offence" in violation of the Double Jeopardy Clause of the Fifth Amendment. The *en banc* Eighth Circuit held that Lara's prosecution should be barred. Pet. App. 1a-22a.

The court of appeals' decision contravenes fundamental, established precepts of Congressional authority in relations with Tribes and Indians. Where Congress acts in certain realms in which its power is plenary (*e.g.*, Indian law or interstate commerce), Congress may authorize a sovereign entity such as a Tribe or State to exercise governmental authority *qua* sovereign. Congress's recognition of such authority in a Tribe or a State does not convert that sovereign into a federal agency. Nor is Congressional Indian policy confined, as Lara asserts, to the diminution of tribal sovereignty: just as Congress has curtailed tribal sovereignty, Congress may restore and recognize aspects of sovereignty – including tribal criminal jurisdiction over all Indians.

SUMMARY OF ARGUMENT

The Constitution does not limit Congress's power to remove federal common law restrictions on the exercise of tribal sovereignty by "recogniz[ing] and affirm[ing]" "the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2). To the contrary, Congress may exercise its "plenary" power over Indian affairs to define the bundle of sovereign attributes of the Tribes to include such criminal law jurisdiction. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978).

Although the Tribes' incorporation into the United States limited their ability to conduct foreign relations and to alienate land, they were nonetheless recognized as sovereigns and retained police power within their territory except as limited by Congress. *Cherokee Nation* v. *Georgia*, 30 U.S. 1, 17 (1831); *Talton* v. *Mayes*, 163 U.S. 376 (1896). Throughout our nation's history, Congress has freely exercised its authority to alter tribal sovereignty, generally in

ways that diminished tribal territory and power. This Court has never acted to rein in these congressional abrogations of and amendments to tribal sovereignty, but has permitted federal Indian policy to proceed from isolation, to assimilation, to termination, to self-governance, without a murmur of any constitutional impediment. Indeed, the Court initially treated Indian policy as raising unreviewable political questions, and currently reviews Congress's acts only to determine whether they are "'tied rationally to the fulfillment of Congress' unique obligation toward the Indians.'" *Delaware Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 85 (1977). And nothing in the Constitution or this Court's precedents suggests that Congress's authority in this area is a one-way ratchet, permitting diminution of tribal sovereignty but never the recognition or affirmation of it.

The Court has uniformly treated the makeup of the bundle of the Tribes' sovereign attributes as a matter for Congress, or absent express Congressional direction, as a matter of federal common law, subject to Congress's authority to propound contrary positive law. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313 (1981). Thus, the Court's decisions addressing the scope of tribal courts' criminal jurisdiction establish common law rules subject to Congressional "defeasance." *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978). The *Duro* fix is a congressional response to this Court's decision holding, as a matter of federal common law, that Tribes lack criminal jurisdiction over non-member Indians. The *Duro* opinion cites no provision of the Constitution compelling its result; to the contrary, the Court suggested that Congress could address any void in criminal jurisdiction in Indian country that might result from its decision. See *Duro*, 495 U.S. at 694.

It is precisely because a Tribe is a sovereign governmental authority that Congress may authorize the Tribe *qua sovereign* to exercise sovereign powers, rather than to act as a federal agency. "[T]he existence of the right in Congress to regulate the manner in which the local powers of the [Tribe]

shall be exercised *does not render such local powers Federal powers*." *Talton*, 163 U.S. at 384. Indeed, in authorizing the Tribes to exercise the sovereign power to prosecute all Indians, Congress acted toward the Tribes as it had acted toward the States when, under Public Law 280, Congress lifted the common law restriction on the States' exercise of criminal and civil jurisdiction in Indian country. Congress's authority vis-à-vis the Tribes in this arena is also analogous to its power to lift the constraints placed on States by the dormant Commerce Clause and to allow States to exercise their sovereign police power. In neither instance are the States somehow transmuted into federal agencies; instead, Congress removes a federal barrier to the exercise of sovereignty – as the *Duro* fix did.

The substantial, damaging implications of holding that tribal sovereignty cannot be authorized – and that Congress must instead delegate judicial power to tribal courts – militate strongly against any such decision. The Court has never addressed whether federal judicial power may be delegated to tribal courts or if so, whether, such courts are Article I courts whose judges are subject to the Appointments Clause of the Constitution – both difficult constitutional questions. If Congress can establish tribal courts as Article I courts, dual prosecutions by such courts and federal courts will place defendants in double jeopardy. If Congress cannot do so, then Congress cannot address criminal law jurisdiction issues by apportioning federal, state and tribal realms, and this Court's entreaties to Congress to enact positive law make little sense. *Duro* does not require Congress to choose between the unpalatable options of delegating judicial power to tribal judges, making tribal courts federal agencies, or allowing non-member Indians to commit certain crimes with impunity in Indian country. Instead, Congress may remove the common law barrier to tribal courts' sovereign power to exercise criminal jurisdiction over all Indians.

ARGUMENT

THE CONSTITUTION DOES NOT LIMIT CONGRESS'S POWER TO REMOVE COMMON LAW BARRIERS TO EXERCISES OF TRIBAL SOVEREIGNTY

A. The Issue Is The Scope of Congressional Power.

There is no question that in enacting the ICRA amendment at issue, Congress intended to affirm the authority of Tribes *qua* sovereigns to exercise criminal jurisdiction over all Indians, both members and nonmembers of the Tribe.

In *Duro* v. *Reina*, 495 U.S. 676 (1990), this Court had held that although Indian Tribes act as sovereigns when they enforce their criminal laws against tribal members, they lack sovereign power to enforce their criminal laws against other Indians. In prompt response to that decision, Congress amended ICRA by clarifying that the Tribes' powers of self-government include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2).

This language makes plain that Indian Tribes are acting as sovereigns when, pursuant to the *Duro* fix, they enforce their criminal laws against any Indian, tribal member or non-member, and is dispositive of the statutory construction issue. See *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). The Tribe is deemed to exercise this criminal jurisdiction as a "'power[] of self-government'" – that is, as a sovereign power – and not as a federal agency or instrumentality. 25 U.S.C. § 1301(2). If further assurance were needed, the legislative history provides it. The House Report explicitly states that "this legislation is not a federal delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations." H.R. Rep. No. 102-61, at 7 (1991); see also S. Rep. No. 102-168, at 4 (1991)

("recogniz[ing] and reaffirm[ing] the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians"); H.R. Conf. Rep. No. 102-261, at 3 (1991) (similar). By contrast, absolutely nothing in the language and legislative history of the ICRA amendment suggests that Congress sought to delegate federal judicial power to tribal courts or otherwise to convert tribal prosecutors and courts into federal agents and instrumentalities, with the attendant constitutional difficulties that such a delegation would entail. See *infra* at 24-29.

Lara nonetheless argues, and the court of appeals agreed, that the *Duro* fix must have delegated federal judicial power to the Tribes.[3] Specifically, he claims that Congress lacks any authority to alter this Court's common law pronouncements regarding the scope of the Tribes' sovereign power. Instead, the argument runs, because Congress clearly desired to authorize the Tribes to prosecute non-member Indians, the *Duro* fix must be construed as a delegation of federal judicial power to the Tribes. See Pet. App. 10a, 11a (holding "that Congress wished to allow tribes to exercise criminal misdemeanor jurisdiction over nonmember Indians" and therefore that Lara "was necessarily prosecuted pursuant to . . . delegated power"). The premise of this argument runs directly contrary to established principles of Congressional authority with respect to the Tribes.

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[3] The Double Jeopardy Clause prohibits any person "for the same offence to be twice put in jeopardy of life or limb." A person whose action violates the laws of different sovereigns, however, commits an offense against each. Accordingly, a second prosecution by a different sovereign is not for "'the same offence'" and does not run afoul of the Double Jeopardy Clause. *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985). Lara believes that in prosecuting him, the Spirit Lake Nation acted as an agency of the United States, rather than as a separate sovereign, and therefore that the United States' subsequent prosecution violated the Double Jeopardy Clause.

B. The Constitution Provides Congress With Broad Power To Define The Sovereign Attributes Of Indian Tribes.

The Constitution does not define tribal sovereignty as a fixed quantum of power or delineate the attributes of sovereignty that the Tribes possess after their incorporation into the United States. Instead, this Court has long held that Congress, in the exercise of its "plenary" power over Indian affairs, has great latitude to take actions affecting tribal sovereignty. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978).[4]

Tribes were incorporated into the United States as sovereigns or "distinct political communities," albeit subject to the paramount authority of the United States. *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 556-57 (1832); Felix S. Cohen, *Handbook of Federal Indian Law* 232 (1982 ed.). Under international law, the Tribes' incorporation was deemed inconsistent with further independent dealings with foreign nations and with external disposition of tribal land, see *Cherokee Nation* v. *Georgia*, 30 U.S. 1, 17 (1831); *Johnson* v. *McIntosh*, 21 U.S. (8 Wheat.) 543, 572-88 (1823). But the

[4] The Indian Commerce Clause empowers Congress "to regulate Commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. This Clause is the principal constitutional provision conferring federal power over Indians, and this Court has construed it as broadly authorizing Congress to regulate the United States' relationships with Tribes and individual Indians. *See, e.g.*, *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 417-18 (1865); *United States* v. *Mazurie*, 419 U.S. 544, 554-56 (1975); *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989) ("the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs"). Other constitutional provisions that do not specifically reference Indians, such as the Treaty Clause (U.S. Const. art. II, § 2, cl. 2), and the Property Clause (*id.* art. IV, § 3, cl. 2), are additional sources of federal authority over Indian matters. In conjunction, these constitutional provisions confer upon the federal government a broad power to regulate Indian affairs. *See generally* Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed.).

Court otherwise recognized the Tribes' continuing sovereign powers within their territory, subject to the federal government's exclusive power to regulate relations with the Tribes. See *Talton* v. *Mayes* 163 U.S. 376, 384 (1896) (characterizing Cherokee nation's criminal courts as an exercise of "the power[] of local self-government" that "existed prior to the Constitution"); *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883) (recognizing tribal courts' exclusive criminal jurisdiction over tribal members as part of tribal sovereignty unless expressly curtailed or eliminated by the United States); *Worcester*, 31 U.S. at 561.

Through the history of the Republic, Congress has regularly exercised its broad authority over Indian affairs, altering the content of federal Indian policy in a manner that has dramatically affected the scope of tribal sovereignty. See Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 Yale L.J. 1, 14-15 (1999).[5] For example, in the late 19th century, Congress "retreated

[5] The initial policy of tribal isolation commenced in 1790 and is symbolized by the Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (1830). *See also* William C. Canby, Jr., *American Indian Law in a Nutshell* 11 (2d ed. 1988) (citing Act of July 22, 1790, ch. 33, 1 Stat. 137; Act of March 30, 1802, ch. 13, 2 Stat. 139; Act of June 30, 1834, ch. 161, 4 Stat. 729). The policy of assimilation is embodied in the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, which divided and allocated reservation land among individual Indians in a failed attempt to make them farmers. This policy was acknowledged to be a failure, and Congress initially adopted a policy of limited self-determination in the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479). This Act ended allotment, restoring unsold lands to the Tribes, and sought to encourage tribal self-determination. Although the policy of self-determination continues today, *see, e.g.*, Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. §§ 450-450n, 455-458e), there was a period during the 1950's where a policy of assimilation re-emerged, as the federal government terminated its recognition of approximately 100 Tribes. *See* H.R. Cong. Res. 108, 83rd Cong., 67 Stat. B132 (1953).

from the reservation concept and began to dismantle the territories that it had previously set aside as permanent and exclusive homes for Indian tribes." *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 335 (1998). Through the General Allotment Act of 1887 (frequently referred to as the "Dawes Act"), Congress provided for the allotment to individual Indians of treaty-specified reservation land over which Tribes had previously exercised dominion, with "surplus" land opened to non-Indian homesteading. *Id.* at 335-36; *see also* Frickey, *supra*, at 14-15. Implemented on a Tribe-by-Tribe basis, the allotment policy resulted in the diminishment or disestablishment of numerous reservations, with a correspondingly devastating reduction in the ability of the affected Tribes to exercise sovereign authority. See, *e.g.*, *Yankton Sioux*, 522 U.S. at 334 (holding that Congressional legislation enacted pursuant to the Dawes Act had resulted in the diminishment of the Yankton Sioux Reservation, with the result that South Dakota enjoyed primary jurisdiction over land previously held by the Tribe); *Hagen* v. *Utah*, 510 U.S. 399 (1994) (finding the Uintah Valley Reservation in Utah to have been diminished by allotment-era legislation, such that the State could exercise criminal jurisdiction over an Indian who committed an offense on the former reservation land).

In the Indian Reorganization Act of 1934, Congress "formally repudiated" this allotment policy, *Yankton Sioux*, 522 U.S. at 339, and provided that no further divestiture of tribal land take place. Chapter 576, § 4, 48 Stat. 984, 985 (codified at 25 U.S.C. § 464). The Act further set in motion a federal Indian policy of tribal self-governance that continues to this day. See, *e.g.*, Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. §§ 450-450n, 455-458e); 25 U.S.C. § 450a(b) (declaring Congress's "commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people through the

establishment of a meaningful Indian self-determination policy").

Necessarily, as Congress's federal Indian policy has changed, so, too, has Congress's conception of the appropriate scope of tribal sovereignty. See, *e.g.*, Cohen, *supra*, at 239-40. Yet, this Court has never gainsaid either Congress's plenary authority to make and change Indian policy or Congress's related plenary authority to diminish or expand tribal sovereignty. To the contrary, the Court has frequently reiterated that "Congress possesses plenary power over Indian affairs, *including the power to modify or eliminate tribal rights*." *Yankton Sioux*, 522 U.S. at 343 (emphasis supplied).

This Court initially treated the federal government's relationship with Indians as if it were analogous to the federal government's relationship with foreign states – *viz.*, as if the relationship involved political questions, not subject to judicial review. See, *e.g.*, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565 (1903) (characterizing Congress's authority over the Indians as "a political one, not subject to be controlled by the judicial department of the government"); *Holliday*, 70 U.S. at 419 ("[i]n reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs"). As the 20th century progressed, the Court ceased to treat tribal relations as presenting unreviewable "political" questions, but nonetheless placed no substantial constraints on congressional power. Today, this Court characterizes Congress's power in this arena as "plenary," reviewable only to determine whether the legislative act is "'tied rationally to the fulfillment of Congress' unique obligation toward the Indians.'" *Delaware Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 83-85 (1977); *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974).

Congress's exercises of its "plenary power" have most frequently diminished tribal sovereignty, often with serious

consequences for the Tribes. For example, in *Lone Wolf*, the Court upheld Congress's power to abrogate Indian treaties, and the assertion of that power in the allotment era resulted in the loss of 90 million acres of tribal land and corresponding diminutions in sovereign power. See generally Cohen, *supra*, at 129-38; Charles F. Wilkinson, *American Indians, Time, And The Law* (1987); Robert N. Clinton, *Redressing The Legacy Of Conquest: A Vision Quest For A Decolonized Federal Indian Law*, 46 Ark. L. Rev. 77 (1993). Although the Tribes have often vigorously resisted Congressional Indian policies, the Court has consistently treated the makeup of the bundle of sovereign attributes as a matter for Congress or, if Congress has not spoken, as a matter of federal common law. Here, however, without textual support in the Constitution, the Eighth Circuit held that Congress's authority in this area is a one-way ratchet – *viz.*, Congress may strip the Tribes of their sovereign attributes but may not authorize or restore tribal sovereignty. Nothing in either the Constitution or this Court's precedents supports this internally inconsistent view of Congressional authority, and it should be rejected.

C. The Tribes' Sovereign Power With Respect To Indians And Indian Country Is Governed By Positive Federal Law And Federal Common Law.

1. In light of the constitutional context described above, this Court has assessed the sovereign authority of the Tribes by examining positive federal law (treaties, statutes, executive orders, and federal regulations) and by filling the gaps in positive law with federal common law.[6] The Tribes' authority to regulate the people and activities within their

[6] A federal common law rule is "a rule of decision that amounts, not simply to an interpretation of a federal statute or a properly promulgated administrative rule, but, rather, to the judicial 'creation' of a special federal rule of decision" in an area where uniform federal law is necessary to further "'some federal policy or interest.'" *Atherton* v. *FDIC*, 519 U.S. 213, 218 (1997).

reservations is uniformly analyzed within this framework, and is often governed by federal common law rules.

Thus, for example, in *National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845 (1985), this Court held that a federal district court had federal question jurisdiction to decide the lawful limits of tribal court jurisdiction, because the scope of the tribal court's power was a question of federal common law rules "fashioned by court decisions." *Id.* at 850. In elaborating, the Court observed generally that federal common law "provides significant protection for the individual, territorial, and political rights of the Indian tribes." *Id.* at 851.

In assessing the scope of tribal sovereignty, this Court has routinely sought to discover Congress's will and, where it failed to unearth an express or clear manifestation of that will, has developed federal common law rules. Most recently, in *Nevada* v. *Hicks*, 533 U.S. 353 (2001), the Court explained that Tribes have sovereign powers where necessary "'to protect tribal self-government or to control internal relations,'" and, indeed, may possess even broader sovereignty with express congressional authorization. *Id.* at 359. See also *Brendale* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (plurality opinion) (authorizing Tribes to zone "closed" reservation lands and to zone open lands to prevent uses that threaten important tribal interests); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 137, 142 (1982) (upholding tribal power to tax non-members leasing mineral rights in reservations because "there is a significant territorial component to tribal power" and "[t]he power to tax is an essential attribute of Indian sovereignty"); *Oneida Indian Nation* v. *County of Oneida, N.Y.*, 414 U.S. 661 (1974) (possessory land claims that implicate Indian lands are the exclusive province of federal law); *Winters* v. *United States*, 207 U.S. 564 (1908) (reserved water rights of Tribes are governed by federal common law).

The clear implication of these decisions is that absent positive law, the scope of tribal sovereignty, like federal Indian law generally, is a matter of federal common law. It is equally clear, however, that these decisions, like all common law decisions of the federal courts, are subject to the ultimate authority of Congress to propound positive law. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313 (1981).[7] Thus, where "Congress addresses a question previously governed by a decision rest[ing] on federal common law the need for [federal common] lawmaking by federal courts disappears." *Id.* at 314.[8]

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[7] Thus, the law governing Congress's power to regulate relations with Indian tribes is analogous to the political branch's power to regulate foreign affairs. Federal common law governs, subject to defeasement by a political branch. This Court made that point clearly in describing the nature of the act of state doctrine. *See Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427-28 (1964) ("[i]f the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and the political branches of the Government on matters bearing upon foreign affairs").

[8] Congress frequently acts in response to the common law decisions of this Court regarding tribal sovereignty. A well-known example is the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"). In *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), this Court held that State regulation of tribal gaming enterprises would impermissibly infringe on tribal governmental authority in light of the compelling federal and tribal interests in promoting tribal self-sufficiency and economic development. *Id.* at 221-22. A year later, Congress enacted IGRA to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" and "a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences." 25 U.S.C. § 2702. With far greater detail than common law decision-making allows, Congress established an intricate structure that distinguishes among types of gaming, provides federal regulatory oversight, and subjects certain

2. The foregoing analysis is fully applicable to this Court's decisions addressing the scope of tribal courts' criminal jurisdiction. This Court's criminal cases established common law rules subject to Congressional "defeasance." *Wheeler*, 435 U.S. at 323. Congress subsequently acted, displacing the common law rule and expressing its will statutorily with respect to tribal criminal law jurisdiction.

Wheeler, *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), and *Duro* – the principal decisions of the modern era regarding tribal criminal jurisdiction – are not constitutionally based. They are instead federal common law decisions subject to Congressional override or amplification. Indeed, in recognition of this fact, the Court implicitly invited Congress to revise its decisions in *Oliphant*, 435 U.S. at 211, and *Duro*, 495 U.S. at 694.

In *Wheeler*, this Court recognized that both the Navajo tribal court and a federal court could prosecute a Navajo tribal member for crimes arising out of a statutory rape without violating the Double Jeopardy Clause, because the Navajo prosecution was "part of its retained sovereignty." 435 U.S. at 328. The critical issue was whether the Tribes' sovereign power had been "explicitly or implicitly" taken away by Congress, and the Court concluded that it had not.

In *Oliphant*, this Court held, as a matter of federal common law, that the Tribe's jurisdiction to try non-Indian criminal defendants had been terminated when the Tribe was incorporated into the United States. The Court analyzed the history of legislation and treaties that demonstrated *Congress's* apparent assumption that the Tribes lack criminal jurisdiction over non-Indians except as provided by treaty, 435 U.S. at 196-206, and made clear that Congress could recognize such jurisdiction if it chose to do so: "By submitting to the overriding sovereignty of the United States,

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gaming to the requirements of a State compacting process to address off-reservation effects of gaming.

Indian tribes therefore necessarily give up their power to [criminally] try non-Indian citizens of the United States *except in a manner acceptable to Congress*." *Id.* at 210 (emphasis supplied). See *id.* at 212 (identifying "considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians").

Duro is to the same effect. In holding that Tribes cannot prosecute a non-member Indian, the Court again found support in its belief that the political branches of the federal government assumed that tribal courts lacked such jurisdiction. 495 U.S. at 688-89. In addition, the Court expressed a policy concern that the exercise of criminal jurisdiction might not adequately protect the non-member Indian's "personal liberties." *Id.* at 688. The Court acknowledged that all Indians are United States citizens, tribal members and non-members alike. It nonetheless relied on "the voluntary character of tribal membership and the concomitant right of participation in a tribal government" to reaffirm the Tribe's sovereign power to prosecute tribal members criminally. *Id.* at 677-78. But, in light of its solicitude for citizens' civil liberties, the Court was unwilling to assume that tribal courts enjoyed criminal jurisdiction over non-member Indians, despite their voluntary presence on and activities affecting public safety on tribal lands: "We hesitate to adopt a view of tribal sovereignty that would single out . . . nonmember Indians . . . for trial by political bodies that do not include them." *Id.* at 693. In declaring federal common law, the Court accordingly "declined to produce such a result through recognition of inherent tribal authority." *Id.* at 694.

Nothing in *Duro* limits Congress's authority to decide, as it has done, that the attributes of sovereignty of a Tribe include the sovereign power criminally to prosecute all Indians for crimes committed in Indian country. The Court did not cite any provision of the Constitution or refer to any penumbral emanation from the Constitution that would preclude Congress from affirming such sovereign powers. Nor did the

Court suggest any limitation on Congress's ability to decide that a person's voluntary presence on or activities affecting public safety on tribal lands may subject that person to tribal court jurisdiction. Indeed, the Court invited Congress to exercise its "ultimate authority" and lift the constraint its decision imposed on the exercise of such authority by the Tribes, *id.* at 698; Congress promptly did just that.

D. The *Duro* Fix Is A Constitutional Exercise Of Congress's Power To Override Federal Common Law Decisions And Reaffirm Tribal Sovereignty.

1. It was in response to the *Duro* Court's invitation that Congress enacted the ICRA amendment at issue, authorizing the Tribes as sovereigns to prosecute all Indians in Indian country. The statute overrode the contrary federal common law decision of the Court. Because a Tribe is a sovereign governmental entity, see *Mazurie*, 419 U.S. at 557 (Indian Tribes are not "'private, voluntary organizations,'" but are instead "unique aggregations possessing attributes of sovereignty over both their members and their territory"), Congress may recognize or restore sovereign tribal powers, *i.e.*, Congress may authorize the Tribe to exercise power *qua* sovereign, and not as a federal agency. As this Court has explained, "the existence of the right in Congress to regulate the manner in which the local powers of the [Tribe] shall be exercised *does not render such local powers Federal powers*." *Talton*, 163 U.S. at 384 (emphasis supplied).

In restoring the Tribes' sovereign power to prosecute all Indians, Congress simply did for Tribes what it had done for States in Public Law 280. Federal common law preempts state criminal jurisdiction over crimes committed by or against Indians in Indian country. See *Bryan* v. *Itasca County, Minn.*, 426 U.S. 373 (1976). In 1953, however, Congress enacted Public Law 280, making mandatory the extension of the criminal jurisdiction of five (later six) States into Indian country. Other States are authorized to exercise such jurisdiction at their option. See Act of Aug. 15, 1953,

Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 1360 (1994)). The law was later amended to require tribal consent to state jurisdiction.[9]

When Congress authorized States to exercise criminal jurisdiction over Indian country, that act did not convert the sovereign States to federal instrumentalities for this purpose. Instead, Congress freed the States of a pre-existing federal common law limitation on their ability to exercise a sovereign power – the States' police power with respect to public safety. Similarly, Congress's amendment of ICRA to restore the Tribes' inherent sovereign power to prosecute non-member Indians for crimes on reservations simply freed the Tribes of a federal common law constraint on their sovereignty.

Another example of the same phenomenon lies in the realm of state taxation of Indian lands. "[I]n recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are

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[9] This is not to suggest tribal jurisdiction over non-member Indians crimes can or will be taken care of by the States. Leaving aside the States whose Indian country jurisdiction Congress made mandatory, the States have been reluctant to take up such jurisdiction; they regard criminal law enforcement on Indian reservations as a kind of unfunded federal mandate, *see* Carole E. Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 U.C.L.A. L. Rev. 1405, 1427 (1997), and Indian Tribes in non-mandatory States have been equally reluctant to invite state law enforcement onto reservations. Indeed, even in mandatory States, there have been significant retrocessions of state jurisdiction to Tribes, *see*, *e.g.*, 51 Fed. Reg. 24,234 (1986) (Winnebago); 46 Fed. Reg. 2195 (1981) (Umatilla); 41 Fed. Reg. 8516 (1976) (Menominee). A similar phenomenon has occurred in States where Public Law 280 jurisdiction was optional, *see*, *e.g.*, 52 Fed. Reg. 8372 (1987) (Colville); 54 Fed. Reg. 19,959 (1989) (Chehalis, Quileute, and Swinomish); 53 Fed. Reg. 5837 (1988) (Ely Indian Colony). In States like North Dakota that have not taken jurisdiction under Public Law 280, only the Tribes enforce reservation Indians' compliance with criminal laws related to non-"major" crimes, such as spousal abuse.

exempt from state taxation within their own territory." *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985) (citing cases). However, Congress may lift the Tribes' exemption from state taxes when it "has made its intention to do so unmistakably clear." *Id.* at 765. When Congress does so, the State is not exercising power as a federal agent; it is instead exercising its sovereign taxing authority because the federal common law restriction on that authority has been lifted by Congress.[10]

Congress's authorization of the Tribes' sovereign power thus may also be analogized to Congress's power vis-a-vis the States under the dormant Commerce Clause. That Clause implicitly limits the States' sovereign power to regulate all commerce within their boundaries. Congress, however, may release the States from the limitation and allow the States to regulate commerce in ways that the Constitution otherwise would forbid. *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 421 (1946). In that circumstance, the State exercises its power not as an agency of the United States, but as a separate sovereign.

Likewise here, in the absence of Congressional action, the Tribes' sovereign powers with respect to criminal jurisdiction were viewed as constrained. But, under the Indian Commerce Clause, Congress, in the exercise of its plenary authority over relations with Indian Tribes, determined that a particular exercise of sovereignty – here, the prosecution of a non-member Indian for a crime committed on a reservation – best serves federal Indian policy, including tribal self-governance and criminal law enforcement on Indian reservations. Just as a State regulating commerce after Congress lifts the constraint

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[10] Indeed, it is precisely because Indian Tribes are sovereigns (not federal instrumentalities) that this Court analyzes the validity of a state tax on tribal land by determining whether it is expressly authorized by Congress or preempted, rather than by determining whether the land is a federal instrumentality. *See* Cohen, *supra*, at 421-23.

of the dormant Commerce Clause is exercising sovereign legislative or regulatory authority, a Tribe exercising prosecutorial power after Congress lifts a common law constraint exercises its sovereign power.[11]

The *Duro* fix simply overturned a federal common law rule restraining an entity already acknowledged to be a sovereign, the Tribes, and thus released the Tribes to act as sovereigns with respect to their exercise of criminal law jurisdiction.[12]

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[11] One scholar has illustrated this point effectively:

> Suppose that the federal courts conclude that a state regulation of semitrailer truck length unduly burdens interstate commerce and declare the state law invalid under the dormant Commerce Clause doctrine – which, although a constitutionally rooted rule, is actually best understood as an aspect of federal common law. Then suppose that Congress enacts legislation authorizing states to regulate the length of such trucks. Surely when the state resumes truck-length regulation, it is exercising its inherent police power – which always existed, even though for a time it was preempted by federal common law – rather than some peculiar delegated federal authority. The effect of the congressional authorizing legislation was to destroy the preemptive barrier of federal common law – thereby allowing the always-existing-but-once-preempted local police power to spring back free from judicial interference – not to delegate special federal power to the state. [Frickey, *supra*, at 68 n.322 (citation omitted).]

[12] This Court's recognition of Congress's power to affect tribal sovereignty in other respects strongly supports the conclusion that Congress has that authority in this case. While Congress has often chosen to defer to tribal membership determinations, *see* Cohen, *supra*, at 20-23, this Court has held that Congress has virtually unlimited authority to define tribe and tribal membership differently as a matter of federal law, *United States* v. *Sandoval*, 231 U.S. 28, 37 (1913); *Delaware Tribal Bus. Comm.*, 430 U.S. at 83-85 (the legislative judgment concerning a tribe is not disturbed so long as special treatment is rationally connected to fulfillment of Congress' obligation to Indians). Congress's broad discretion to determine tribal membership – *viz.*, to expand or contract it and thus to alter the scope of tribal sovereignty – is significant evidence that it is federal positive and common law, rather than the Constitution, that governs the Tribes' attributes of sovereignty.

As such, the statute fits comfortably within Congress's plenary authority with respect to federal Indian policy.

2. Those arguing that *Duro*'s holding is mandated by the Constitution pluck discrete words and phrases out of the context of the opinion (and, indeed, from the context of federal Indian law), and then imbue these words and phrases with layered meaning. But, a constitutional structure – *viz.*, a rigid federal Indian law policy – cannot be built upon so limited a foundation.

First, respondent and the lower court suggest that the *Duro* Court's reference to the absence of a congressional "delegation" of prosecutorial authority over non-member Indians implies that Tribes can exercise this authority only as agencies of the federal government, and not as sovereigns. However, the Court's use of the word "delegation" in recognizing that Congress could correct any gaps in law enforcement resulting from its decision cannot be tortured into a judicial pronouncement that Congress can fill the gap *only* by turning tribal courts into federal agencies. In context, the word "delegation" refers to Congress's power to authorize exercises of tribal sovereignty. In fact, as explained *supra* at 17-20, when governmental power is "delegated" to a sovereign, that entity may exercise it as a sovereign if Congress so provides. Cf. *Talton*, 163 U.S. at 384 ("the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers"). Finally, as it set forth in detail in Part E., *infra*, the

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A similar point can be made with respect to Congressional control over tribal sovereign immunity. This Court has held that a Tribe is entitled to sovereign immunity and thus is not subject to suit "unless 'Congress has authorized the suit or the tribe has waived its immunity.'" *C&L Enters., Inc.* v. *Citizen Band of Potawatomi Indian Tribe*, 532 U.S. 411, 414 (2001) (quoting *Kiowa Tribe* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998)). This attribute of sovereignty, too, is therefore a matter of federal positive and common law.

serious constitutional questions raised by a delegation of federal judicial power to tribal courts strongly suggests that this Court's use of the word was not intended to limit Congressional authority.

In a related point, the court below appears to have believed that "[o]nce the federal sovereign divests a tribe of a particular power, it is no longer an inherent power and it may only be restored by delegation of Congress's power." Pet. App. 8a. This Court has never so held. To the contrary, the Court reserved this question in *Wheeler*, 435 U.S. at 328 n.28 ("[b]y emphasizing that the Navajo Tribe never lost its sovereign power to try tribal criminals, we do not mean to imply that a tribe which was deprived of that right by statute or treaty and then regained it by Act of Congress would necessarily be an arm of the Federal Government"). Moreover, this Court's deferential treatment of Congress's frequent changes of policy concerning tribal sovereignty belie this claim. See *supra* at 9-11. The *Duro* fix "did not create a new tribal power out of whole cloth, it merely relaxed a common-law restriction on a power previously possessed" by a sovereign, as Congress, with its plenary authority in this area, is fully empowered to do. Pet. App. 12a-13a (Arnold, J., dissenting). See Frickey, *supra*, at 8. Indeed, if a sovereign power once lost is lost forever, then the scores of Tribes with respect to which federal recognition has been withdrawn and restored would exercise *no* sovereign powers – contrary to Congress's clear intent and the decades-long practice since restoration. See, *e.g.*, 25 U.S.C. § 903a(b) ("there are hereby reinstated all rights and privileges of the [Menominee] tribe or its members under Federal treaty, statute, or otherwise which may have been diminished or lost pursuant to" termination); cf. *United States* v. *Long*, 324 F.3d 475 (7th Cir.) (Menominee Tribe exercises sovereign authority, not delegated United States' authority, in criminal prosecutions), *cert. denied*, 124 S. Ct. 151 (2003).

The lower court also erroneously believed that the ICRA amendment violates separation of powers by reversing this Court's factual finding concerning tribal court jurisdiction over non-member Indians. It is because *Duro* is not a constitutionally-based holding that *Duro*'s conclusion – that a Tribe lacks the sovereign attribute of criminal jurisdiction over Indians who are not tribal members – is not a constitutional fact estopping Congress from rendering a contrary judgment. Indeed, the *Duro* Court's assessment of the historical record was hardly categorical. The Court concluded that "[e]vidence on criminal jurisdiction over nonmembers is less clear [than with respect to non-Indians]" and merely "on balance supports the view that inherent tribal jurisdiction extends to tribe members only." 495 U.S. at 691. Accordingly, whatever the limitations on Congress's ability retroactively to disagree with the Court's factual determinations, this simply is not a case where congressional disagreement can be viewed as unreasonable, arbitrary, or counterfactual, let alone a violation of separation of powers. Indeed, in light of Congress's virtually plenary authority to determine the sovereign powers of Tribes, an ambiguous historical record does not limit Congress's power to recognize Tribal authority to prosecute non-member Indians.[13]

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[13] As Congress explained in enacting the ICRA amendment at issue,

> [t]hroughout the history of this country, the Congress has never questioned the power of tribal courts to exercise misdemeanor jurisdiction over non-tribal member Indians in the same manner that such courts exercise misdemeanor jurisdiction over tribal members. Instead the Congress has recognized that tribal governments afford a broad array of rights and privileges to non-tribal members. Non-tribal member Indians own property on Indian reservations, their children attend tribal schools, their families receive health care from tribal hospitals and clinics. Federally administered programs and services are provided to Indian people because of their status as Indians, without regard to whether their tribal membership is the same as their reservation residence. [H.R. Rep. No. 101-938, at 133 (1991).]

Finally, this case does not raise the question whether the ICRA amendment violates the Equal Protection Clause by authorizing *tribal prosecution* of non-member Indians, because only the *federal prosecution* is at issue here. Such a challenge could appropriately be raised only in the context of a tribal prosecution or a habeas petition challenging such a prosecution. And, when raised in that context, the claim will have to contend with the *Duro* Court's reaffirmation that Indians' status as citizens "does not alter the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits." *Id.* at 692 (citing *United States* v. *Antelope*, 430 U.S. 641 (1977)). In addition, the court would have to consider that under ICRA, tribal courts provide almost all constitutional protections provided in federal court, as well as access to the Great Writ, and are severely constrained in their authority to imprison or fine. See note 2 *supra*.

In sum, under this Court's established jurisprudence, Congress has "plenary authority to alter" and define the allocation of criminal jurisdiction in Indian country, see *Negonsott* v. *Samuels*, 507 U.S. 99, 103 (1993). This Court has sanctioned Congress's abrogation of tribal powers on the grounds that such powers are not dictated by the Constitution. The same principle surely operates to protect Congressional action against attack where Congress has sought to vindicate tribal powers. Congress's clearly manifested intent governs: The Tribes act as sovereigns in criminally prosecuting Indians for non-"major" crimes in Indian country.

E. The Substantial Implications Of A Delegation Of Federal Judicial Power To Tribal Courts Would Be Dramatic, Thereby Demonstrating That *Duro* States A Federal Common Law Rule.

In *Duro*, this Court acknowledged that its holding could result in a jurisdictional void in criminal law enforcement in Indian country, but declared that Congress had ultimate authority to fill any such void. When the substantial

constitutional questions raised by the delegation of federal judicial power to the tribal courts are considered, this Court's matter-of-fact statement that Congress could cure any ill effects of its decision is another indication that the holding rested on federal common law and that Congress may constitutionally define the Tribes' sovereignty to include criminal jurisdiction over all Indians. Indeed, the implications of a holding that Congress cannot recognize or restore the scope of tribal sovereignty and can fill the jurisdictional void left by *Duro* only through delegating federal judicial power are dramatic – potentially making it impossible for Congress to bring cohesion and rationality to criminal law enforcement (and other issues) in Indian country and rendering this Court's requests for Congressional action incoherent.

Federal criminal statutes establish the basic law enforcement framework for Indian country. The Indian Country Crimes Act provides that the criminal law of the United States applies in Indian country with the important exception that it does "not extend to offenses committed by one Indian against the person or property of another Indian." 18 U.S.C. § 1152. Under the Major Crimes Act, however, the federal government has jurisdiction to prosecute Indians for named "major" crimes in Indian country whether the victim is "another Indian or other person." *Id.* § 1153.[14] There remains the question of prosecution of non-"major" crimes committed by Indians in Indian country.

Under *Wheeler*, tribal courts may prosecute members for such crimes. And, under Public Law 280, a State may have jurisdiction to enforce its criminal laws against Indians in

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[14] Only States covered by Public Law 280 have criminal jurisdiction over Indian country within their borders. Absent this or some analogous federal authorization, state courts have criminal jurisdiction in Indian country only when both the accused and the victim are non-Indian. *See United States* v. *McBratney*, 104 U.S. 621, 624 (1881).

Indian country if the State agrees to assume such jurisdiction and if the Tribe consents to it. These stars have not often aligned, however; and, as was true here, State jurisdiction is usually lacking. Accordingly, as this Court acknowledged, *Duro* left a "jurisdictional void" – non-"major" crimes committed by an Indian who was not a member of the Tribe with sovereignty in the relevant reservation could not be prosecuted by any government. See also S. Rep. No. 102-168, at 4. But, the Court did not consider this a serious impediment to its holding, because it also recognized that Congress, with its "ultimate authority over Indian affairs," had the power to eliminate the jurisdictional gap. *Duro*, 495 U.S. at 698.

The Court's seemingly simple proposal only works if the Court assumed that Congress would be able to restore the Tribe's sovereign powers. If the fix depends upon purely delegated authority, the issue is at the very least complicated, given the limits on Congress's ability to delegate federal judicial power.

First, Article III, Section 1 provides that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," and further mandates that the judges of those courts shall hold office during good behavior and receive compensation that is not diminished during their tenure. The constitutionality of a delegation of federal judicial power to a non-Article III body such as a tribal court "must be assessed by reference to the purposes underlying the requirements of Article III" – the preservation of an impartial and independent federal adjudication of claims and the safeguarding of the judicial role within the federal system. See *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 849-50 (1986). In determining whether a criminal-jurisdiction delegation undermines the purposes of Article III, the Court considers, *inter alia*, "the extent to which the non-Article III forum exercises the range of jurisdiction and

powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III." *Id.* at 851 (citing cases).

The Court has never addressed whether a delegation of federal judicial power to tribal courts, let alone a delegation of criminal jurisdiction to tribal courts, passes muster under Article III. Cf. *Stephens* v. *Cherokee Nation*, 174 U.S. 445 (1899) (special temporary court established solely to address rights of individuals to citizenship in named tribes). Plainly, the question would require a complex balancing of the purposes of Article III and the historic role of tribal governments and courts. It therefore seems highly unlikely that the Court had a delegation of Article III power in mind when it stated without elaboration in *Duro* that Congress had "ultimate authority" over Indian affairs to fill any jurisdictional void in criminal law enforcement in Indian country.

Second, if Congress were to delegate federal judicial power to tribal courts, then tribal courts arguably would be Article I or legislative courts, making the judges of such courts "inferior Officers" whose appointments must conform to the Appointments Clause of the Constitution, U.S. Const. art. II, § 2, cl. 2. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam) ("any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II]"); *Freytag* v. *Commissioner*, 501 U.S. 868, 881 (1991) (holding that special trial judges in the tax court are "'inferior Officers'" under the Appointments Clause). Under the Appointments Clause, "the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. Again, it seems improbable that the Court in *Duro* intended to require the appointment of tribal judges

pursuant to the Appointments Clause when it opined that Congress had ultimate authority to restore the criminal jurisdiction of tribal courts.[15]

As this discussion shows, the implication of holding that Congress cannot amend the scope of tribal sovereign powers would be substantial and dramatic. Assuming that it could do so, Congress would be required to create Article I courts (or deem tribal courts Article I courts) for certain defendants (nonmember Indians), but not for others, to preserve insofar as possible tribal self-governance. Tribal judges would have to be appointed pursuant to the Appointments Clause to the extent they were adjudicating cases against nonmember defendants. It would be extremely difficult, if not impossible, to establish a coherent, rational structure of tribal courts in this setting. Moreover, any trial by a tribal court would preclude subsequent federal prosecution under the Double Jeopardy Clause, despite the Tribes' extremely limited authority to imprison or fine. Tribes would be put to the choice of prosecuting non-member Indians, thereby eliminating the possibility of more substantial federal prosecutions, or of abstaining from such prosecutions in the hope that the federal government, whose resources and inclination to address such matters are limited, will assume the responsibility. In either event, many defendants facing

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[15] It is also noteworthy that if Congress converted tribal courts to federal agencies or instrumentalities, the United States would face expanded liability for the torts of tribal courts and prosecutors pursuant to, *e.g.*, the Federal Tort Claims Act, 28 U.S.C. § 2675(a). The expansion of Congress's waiver of federal sovereign immunity is a serious consequence of treating tribes and tribal officers as federal agents or instrumentalities in exercising criminal law jurisdiction. Again, the Court's easy assumption of Congress's power to fill *Duro*'s jurisdictional void seems inconsistent with the gravity of the consequences that an exercise of such power would entail. (There are instances in which the United States has expressly taken on tort liability for tribal actions, *see* Claims Resulting from Performance of Contract; Civil Action Against Tribe, 25 U.S.C. § 450f note, but the ICRA amendment at issue contains no indication of any such intent.)

serious criminal charges (such as Lara) would ultimately either avoid prosecution or receive a less serious punishment than their crimes warrant.

Equally to the point, if Congress cannot authorize the Tribes to act *qua* Tribes, and if delegation is constitutionally problematic, then Congress will be severely constrained in bringing a greater uniformity and precision to bear on the allocation of jurisdiction in Indian country than common law decision making allows. Correspondingly, the Court's invitations to Congress to address the complicated jurisdictional issues that arise in Indian country will make little sense. See *Oliphant*, 435 U.S. at 212 ("these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians"); *Kiowa Tribe* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 760 (1998) (choosing "to defer to Congress" on the question whether the federal common law of tribal sovereign immunity be changed).

In sum, nothing in *Duro* even hints that this Court believed that the federal government would face the Hobson's Choice of either (a) delegating Article III judicial power to tribal judges appointed pursuant to the Appointments Clause (if such a delegation is constitutional) and converting tribal prosecutors and courts into federal agents or (b) living with a jurisdictional void and giving non-member Indians a free pass to commit non-"major" crimes in Indian country. *Duro* instead allows Congress to address the jurisdictional void resulting from the decision by removing the barrier posed by the Court's federal common law rule to tribal criminal prosecution of all Indians.

CONCLUSION

The judgment of the court of appeals should be reversed.

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UNITED STATES OF AMERICA,

Petitioner,

v.

BILLY JO LARA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF THE STATES OF IDAHO, ALABAMA, LOUISIANA, NEBRASKA, SOUTH DAKOTA, AND UTAH SUPPORTING PETITIONER IN PART

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE* STATES	1
STATEMENT	4
SUMMARY OF THE ARGUMENT	10
ARGUMENT	12
I. BECAUSE THE ICRA AMENDMENTS DO NOT DELEGATE FEDERAL PROSECUTORIAL AUTHORITY, RESPONDENT'S DOUBLE JEOPARDY CLAIM FAILS. THE QUESTION WHETHER CONGRESS CAN "RESTORE" INHERENT TRIBAL AUTHORITY SHOULD NOT BE ADDRESSED	12
II. CONGRESS LACKED AUTHORITY UNDER THE INDIAN COMMERCE CLAUSE TO CONFER RETAINED INHERENT AUTHORITY ON TRIBES	18
CONCLUSION	29

TABLE OF AUTHORITIES

Page

CASES:

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).....13

Atherton v. FDIC, 519 U.S. 213 (1997).....22

Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989).....15

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).....22

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).....25

Chickasaw Nation v. United States, 534 U.S. 84 (2001).....15

City of Boerne v. Flores, 521 U.S. 507 (1997).....23

City of Milwaukee v. Illinois, 451 U.S. 304 (1981).....21, 22

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992).....15

Crowell v. Benson, 285 U.S. 22 (1932).....14

Diamond v. Chakrabarty, 447 U.S. 303 (1980).....24

Dickerson v. United States, 530 U.S. 428 (2000).....23

Duro v. Reina, 495 U.S. 676 (1990).....*passim*

Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984).....20

Ex parte Crow Dog, 109 U.S. 556 (1883).....25

FEC v. Akins, 524 U.S. 11 (1998).....14

Field v. Mans, 516 U.S. 59 (1995).....16

Fletcher v. Peck, 10 U.S. (6 Cranch) 84 (1810).....25

Fox v. Ohio, 46 U.S. (5 How.) 410 (1847).....12

TABLE OF AUTHORITIES – Continued

Page

Heath v. Alabama, 474 U.S. 82 (1985).....12

Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).....25

Kent v. Dulles, 357 U.S. 116 (1958).....14

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).....22

Means v. Northern Cheyenne Tribal Court, 154 F.3d 941 (9th Cir. 1998).....14, 15, 16

Montana v. United States, 450 U.S. 544 (1981).....15

Morisette v. United States, 342 U.S. 246 (1952).....16

Morris v. Tanner, No. CV 99-82-M-DWM, 2003 WL 22439854 (D. Mont. Oct. 28, 2003).....18

National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 845 (1985).....19, 20, 21, 22

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).....*passim*

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).....14, 23

Rice v. Rehner, 463 U.S. 713 (1983).....20

Rivers v. Roadway Exp., Inc., 511 U.S. 298 (1994).....24

Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1992).....23

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 1

Seminole Tribe v. Florida, 517 U.S. 44 (1996).....27

Steel Co. v. Citizens for Better Env't, 523 U.S. 83 (1998).....14

Talton v. Mayes, 163 U.S. 376 (1896) 2

Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).....22

TABLE OF AUTHORITIES – Continued

Page

United States v. Dixon, 509 U.S. 688 (1993) 12

United States v. Enas, 255 F.3d 662 (9th Cir. 2001) (*en banc*), *cert. denied*, 534 U.S. 1115 (2002)....9, 15, 16, 18, 19

United States v. Kagama, 118 U.S. 375 (1886).....25

United States v. Long, 324 F.3d 475 (7th Cir.), *cert. denied*, 72 U.S.L.W. 3225 (U.S. Oct. 6, 2003) (No. 1801).....26

United States v. Lopez, 514 U.S. 549 (1995).....23

United States v. Rogers, 45 U.S. (4 How.) 567 (1846).....25

United States v. Weaselhead, 156 F.3d 818 (8th Cir. 1998).....16, 17

United States v. Weaselhead, 165 F.3d 1209 (8th Cir.), *cert. denied*, 528 U.S. 829 (1999) 7

United States v. Wheeler, 435 U.S. 313 (1978).....13, 15, 21, 26, 28

Williams v. Taylor, 529 U.S. 362 (2000) 23

CONSTITUTION AND STATUTES:

U.S. Constitution
Article I, § 8, cl. 3 2

18 U.S.C. § 111(a)(1) 9

18 U.S.C. § 1153.....13

18 U.S.C. § 1362..... 4

18 U.S.C. § 2032.....13

TABLE OF AUTHORITIES – Continued

Page

Indian Civil Rights Act, 25 U.S.C. §§ 1301-1308 2

25 U.S.C. § 1301(2).....5, 7, 15

25 U.S.C. § 1301(4).....2, 7

25 U.S.C. § 1303.....2, 3

MISCELLANEOUS:

Public Law 280, Act of Aug. 15, 1953, 67 Stat. 588..... 4

Pub. L. No. 101-511, 104 Stat. 1856 (1990).....5, 6

Pub. L. No. 102-137, 105 Stat. 646 (1991)..... 7

H.R. Conf. Rep. No. 938, 101st Cong., 2d Sess. (1990).....5, 6

H.R. Conf. Rep. No. 102-168, 102d Cong., 2d Sess. (1991)..... 8

S. Rep. No. 102-153, 102d Cong., 2d Sess. (1991) 8

137 Cong. Rec. S13,469 (Sept. 23, 1991) 8

Merrill, Thomas W., *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1 (1985).....28

BRIEF AMICUS CURIAE

The States of Idaho *et al.* respectfully submit a brief *amicus curiae* supporting reversal of the judgment below pursuant to S. Ct. R. 37.4.

INTEREST OF *AMICI CURIAE* STATES

Effective law enforcement is a paramount concern of the *amici curiae* States and their political subdivisions. They view law enforcement within Indian country as a multi-sovereign responsibility and recognize that protection of all reservation residents, regardless of Indian or member status, can be achieved only through the comprehensive exercise of federal, state, and tribal authority. The States, therefore, fully share the desire of the United States and tribes to avoid "jurisdictional gap[s]" (Pet. 3) that not only leave criminal behavior unaddressed but also promote such behavior.

The fundamental issue here, however, is not the propriety of adopting laws to address jurisdictional gaps which may have arisen in the wake of this Court's decision in *Duro v. Reina*, 495 U.S. 676 (1990). The issue instead is whether Congress has selected a constitutionally permissible method to achieve that end. Just as the States have a core sovereign interest in effective law enforcement, so too do they have a fundamental interest in ensuring that their citizens are accorded those rights guaranteed under the United States Constitution where criminal sanctions are possible. It is settled, of course, that Indian tribes are extra-constitutional sovereigns not subject to the Bill of Rights and that exercise of their inherent authority accordingly is not limited by those constitutional provisions. *Santa*

Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); *Talton v. Mayes*, 163 U.S. 376, 384 (1896). It is also settled that while the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301-1303, statutorily confers many of those basic rights, it does not confer all (*Duro*, 495 U.S. at 693). For this and other reasons, the Court recognized in *Duro* that ICRA cannot be viewed as a true substitute for the Bill of Rights. *Id.* at 693. Aside from these purely criminal process-related concerns, the States have an equally fundamental interest in preventing racial criteria from being employed to distinguish among their citizens. The 1990 and 1991 amendments to ICRA "recogniz[ing] and reaffirm[ing]" inherent tribal power over nonmember Indians[1] for criminal jurisdiction purposes raise a significant question as to both of these interests, since Congress has chosen to pursue a path that exposes nonmember Indians, solely on the basis of their ancestry, to deprivation not only of substantive criminal law protections but also of civil remedies normally available against federal officials and employees where governmental overreaching such illegal searches and seizures, false imprisonment or malicious prosecution has occurred. Last, and most important for immediate purposes, Congress has attempted to achieve this otherwise constitutionally problematic result through exercise of authority under the Indian Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, that it does not possess and in derogation of this Court's Article III authority.

[1] The term "nonmember Indian" means, for purposes of this brief, an individual who is an "Indian" under the Major Crimes Act but is not a member of the tribe exercising criminal jurisdiction over him. *See* 25 U.S.C. § 1301(4).

Although the constitutional issue raised here by the United States is thus grave, the *amici* States do not believe that it must be resolved in this case. The dispositive question, in the their view, is whether the ICRA amendments attempted to restore the retained inherent tribal authority found lacking in *Duro* – as their plain text indicates – or whether they effected a delegation of federal authority – as the Eighth Circuit Court of Appeals held. Pet. 10a. If the lower court erred on the threshold statutory construction question, this matter should be at an end because, irrespective of whether the tribal court had criminal jurisdiction over Respondent, no cognizable double jeopardy claim would exist; *i.e.*, even if Congress lacked the power to restore inherent authority to tribes, it did not delegate federal prosecutorial authority to them so as to negate applicability of the dual sovereignty doctrine. Reversal would be required without reference to whether the amendments are valid. Respondent's remedy in that situation would lie in pursuing habeas corpus relief under 25 U.S.C. § 1303 concerning his tribal court conviction, not in attacking the propriety of his federal prosecution.

The *amici* States nevertheless will address the merits of the question presented because of its importance and because they profoundly disagree with the United States' position. The Federal Government asks this Court's sanction of unreviewable congressional power to invest tribes with "retained" and "inherent" authority which the Court has determined previously not to exist in tribes themselves, which Congress itself does possess since it inheres if all only in tribes, and which will operate wholly outside the parameters of the Constitution despite its undeniable congressional genesis. Congress, for example, could "recognize[ ]" the inherent authority of tribes to tax

any person or entity that enters or conducts business on their reservations, could reverse the Court's holding in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), by "reaffirm[ing]" tribal criminal jurisdiction over non-Indians, or could even "recognize[ ]" inherent tribal authority over the States. Such extraordinary, unfettered power will work immediate injury to nonmember Indians like Respondent and lay the doctrinal foundation for incalculable damage in the future to the very fabric of the Constitution.

STATEMENT

A.

In *Duro*, this Court invalidated a conviction by the Pima-Maricopa Indian Community Court of a member of the Torres-Martinez Band of Cahuilla Mission Indians for the offense of firing a weapon on the Salt River Indian Reservation. The Court thereby extended to nonmember Indians the holding in *Oliphant* that tribes lack retained inherent criminal jurisdiction over non-Indians. The final part of the *Duro* opinion addressed concerns over an alleged "jurisdictional void" with respect to "minor offenses committed by nonmember Indians," remarking that "tribes . . . possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands" and that "tribal officers may exercise their power to detain the offender and transport him to the proper authorities." *Duro*, 495 U.S. at 696-97. The Court additionally suggested other mechanisms, such as acquisition of criminal jurisdiction by States under Public Law 280, Act of Aug. 15, 1953, 67 Stat. 588 (codified in relevant part at 18 U.S.C. § 1362), or reciprocal agreements among

tribes. *Duro*, 495 U.S. at 697. It concluded with observation that "[i]f the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress" but that "[w]e cannot . . . accept these arguments of policy as a basis for finding tribal jurisdiction that is inconsistent with precedent, history, and the equal treatment of Native American citizens." *Id.* at 698.

Congress did respond almost immediately through a rider to the Department of Defense Appropriations Act, 1991. Pub. L. No. 101-511, § 8077(b)-(d), 104 Stat. 1856, 1892-93 (1990); *see* H.R. Conf. Rep. No. 938, 101st Cong., 2d Sess. 133 (1990). The rider effected two substantive changes to ICRA. First, the term "powers of self-government," as defined in 25 U.S.C. § 1301(2), was revised to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." Pub. L. No 101-511 § 8077(b), 104 Stat. at 1892.[2] Second, the rider defined the term "Indian" to mean "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies." *Id.*, § 8077(c), 104 Stat. at 1892.

[2] As amended, the entire definition read: "'[P]owers of self-government' means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."

These amendments, however, were effective only until September 30, 1992. *Id.*, § 8077(d), 104 Stat. at 1893.

As the accompanying conference report explained, the amendments were deemed necessary by *Duro*'s "reversing two hundred years of the exercise by tribes of criminal misdemeanor jurisdiction over all Indians residing on their reservations" and by the conferees' perception that "[i]n at least twenty states with substantial Indian populations, the Court's decision has created a jurisdictional void in which neither a tribe, a state, or [*sic*] the Federal government is exercising jurisdiction over crimes committed by non-tribal member Indians in Indian country." H.R. Conf. Rep. No. 938 at 133. The report then identified the constitutional power upon which Congress was relying in adopting the amendments and their purpose:

> In an effort to assure that until Congress is able to enact comprehensive legislation addressing the conditions which have arisen in the aftermath of the Court's decision [in *Duro*], law and order can be restored and preserved in Indian country, sections 8077(b) and (c) recognize and affirm the inherent power of tribes to exercise criminal misdemeanor jurisdiction over all Indians on their respective reservations. Such recognition is consistent with the plenary power over Indian affairs that is vested in the Congress under Article I, section 3, clause 8 of the United States Constitution, and with two hundred years of Federal law enacted by the Congress which recognizes the jurisdiction of tribal governments over Indians in Indian country. [¶] This recognition is supported by Federal policy and practice which in many instances, established Indian reservations on which several tribes were to be settled under the governance of a single tribal

> government. Throughout the history of this country, the Congress has never questioned the power of tribal courts to exercise misdemeanor jurisdiction over non-tribal member Indians in the same manner that such courts exercise misdemeanor jurisdiction over tribal members.

Id. The 1990 amendments were intended, in sum, to undo for approximately one year the holding in *Duro* by "recogniz[ing] and affirm[ing]" inherent tribal authority over all Indians for "misdemeanor" crimes and to afford Congress time to fashion "comprehensive legislation."

Comprehensive legislation was never enacted. Congress simply made the 1990 amendments permanent shortly after their expiration in 1991. Pub. L. No. 102-137, § 1, 105 Stat. 646 (1991) (codified at 25 U.S.C. § 1301(2) and (4)). In the House conference report, the conferees reiterated the nature and intent of the statute:

> This legislation clarifies and reaffirms the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians on their reservations. The Committee of Conference is clarifying an inherent right which tribal governments have always held and was never questioned until the recent Supreme Court decision in *Duro*. . . . The Congressional power to correct the Court's misinterpretation is manifest as is its plenary power over Indian tribes which derives from the Constitution. [¶] The Committee of the Conference asserts that the Congressional power over Indian tribes allows this recognition of the inherent right of tribal governments to retain this jurisdiction and notes that two fundamental maxims of Indian law come into play in this legislation. First, . . . Congress determines Indian policy. Second, Indian tribes retain all rights and

> powers not expressly divested by Congress. [¶] The Committee of the Conference notes that Congress has the power to acknowledge, recognize and affirm the inherent powers of Indian tribes. The Committee of the Conference notes that Indian tribal governments have retained the criminal jurisdiction over non-member Indians and this legislation is not a delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations. Hence, the constitutional status of Indian tribes as it existed prior to the *Duro* decision remains intact.

H.R. Conf. Rep. No. 102-168, 102d Cong., 2d Sess. 3-4 (1991).[3] The legislative history consequently leaves no doubt about congressional intent: The amendments were not intended to delegate federal power but instead embodied a congressional override of this Court's holding in *Duro* on the basis of perceived power under the Indian Commerce Clause.

B.

Respondent pled guilty in the Spirit Lake Nation tribal court of several offenses related to public intoxication and an assault on Bureau of Indian Affairs police officers, and was sentenced to 155 days' imprisonment. Pet. App. 2a, 36a. He is an Indian but not a member of the

[3] The 1991 amendment reflected the legislation, H.R. 972, as passed by the House of Representatives. The Senate had amended the bill to extend the 1990 amendments only until September 30, 1993, but receded from that amendment during conference committee. 137 Cong. Rec. S13,469 (Sept. 23, 1991); *see also* S. Rep. No. 102-153, 102d Cong., 2d Sess. (1991).

Spirit Lake tribe. *Id.* 2a, 23a; *see* Pet. 4 (identifying respondent as member of Turtle Mountain Band of Chippewa Indians). Over two months after the tribal court conviction, he was indicted under 18 U.S.C. § 111(a)(1) for misdemeanor assault of a federal law enforcement officer. Pet. App. 35a, 37a. Respondent eventually entered a conditional plea of guilty which allowed him to appeal denial of the claim that the federal prosecution was barred, *inter alia*, on double jeopardy grounds by the tribal conviction. Pet. App. 36a. An Eighth Circuit three-judge panel affirmed the conviction, concluding first that *Duro* was predicated on "federal common law, not Constitutional law" (*id.* 26a) and that deferral to Congress was therefore required. The panel turned then to the nature of the action taken by Congress in amending the term "powers of self-government" and held that "[t]he plain language of the amended ICRA together with the amendment's legislative history convinces us that Congress intended to recognize inherent tribal power, not to expressly delegate Congressional authority." *Id.* 27a.

The panel opinion was vacated upon the grant of *en banc* review, and the district court judgment later was reversed. The *en banc* court, like the panel, initially addressed the question whether the holding in *Duro* was "constitutional" in nature but concluded, contrary to the panel and the Ninth Circuit Court of Appeals decision in *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001) (*en banc*), *cert. denied*, 534 U.S. 1115 (2002), that "the distinction between a tribe's inherent and delegated powers is of constitutional magnitude and therefore is a matter ultimately entrusted to the Supreme Court." Pet. App. 8a; *accord id.* 10a. Having reached that conclusion, the court briefly addressed the statutory construction issue and

reasoned that since "[i]t is apparent that Congress wished to allow tribes to exercise criminal misdemeanor jurisdiction over nonmember Indians" (*id.*), Respondent "was necessarily prosecuted pursuant to . . . delegated power" (*id.* 11a). Four members of the court dissented as to the determination that "restor[ation]" of inherent tribal authority was beyond congressional power. *Id.* In the dissent's view, the amendments "merely relaxed a common-law restriction on a power previously possessed" (*id.* 12a) – *i.e.*, "the power at hand is a 'retained' one, even if it had been rendered temporarily unavailable by decisions of the United States Supreme Court" (*id.* 13a). Neither the *en banc* opinion nor the dissent discussed whether consideration of Congress' power was essential to resolving the double jeopardy issue.

SUMMARY OF THE ARGUMENT

I. The dispositive issue in this case is whether the ICRA amendments constitute a delegation or a congressional attempt to "restore" retained inherent authority to Indian tribes. The Eighth Circuit erred in construing them as a delegation. The court of appeals effectively applied a variant of the canon of construction that favors reading statutes in a manner that avoids determination of difficult constitutional issues, but reliance on that canon was inappropriate because the amendments unambiguously seek to create inherent tribal authority. They employ a term – "inherent power" – that has specific reference to this Court's Indian law jurisprudence and constitute a direct response to holding in *Duro* that Indian tribes lack such authority over nonmember Indians. The more applicable canon of construction teaches that where Congress

takes terms from the common law, it also presumptively takes their common law meaning, and here the term "inherent authority" refers to the retained inherent tribal authority, not delegated authority. Even were the amendments unambiguous, their legislative history leaves no doubt that Congress consciously attempted to confer inherent authority, and not to delegate federal power. Regardless of whether Congress' attempt was successful, Respondent's tribal court conviction was the act of a separate sovereign and did not bar his subsequent federal court prosecution. The amendments' constitutionality thus presents a nonjusticiable, hypothetical controversy.

II. If this Court reaches the question whether Congress has power under the Indian Commerce Clause to "restore" retained inherent authority to tribes, it should answer that question negatively. The Court has articulated clearly the roles of Judicial and Legislative Branches in the present context, finding the judiciary constitutionally assigned the power to determine whether tribes retain inherent authority over the activities of nonmembers and Congress constitutionally assigned the power to eliminate or restrict such authority. The decision in *Duro* embodies the Court's exercise of its constitutional prerogative "to say what the law is." The "law" was the determination that tribes had been divested of retained inherent authority to subject nonmember Indians to criminal sanction as a "necessary incident" of their dependent status. That divestiture occurred without congressional action and involved authority that Congress never possessed in the first instance to confer. Reliance on the principle that Congress may prospectively undo nonconstitutionally-based federal common law determinations by this Court thus is misplaced, since an implicit assumption of such

principle is that congressional power to act exists. Misplaced for similar reasons is reliance on Congress' "plenary" power under the Indian Commerce Clause. Congress undoubtedly may repeal a statute that limits a tribe's inherent authority, since the repeal merely removes an obstacle that Congress itself created. Conversely, Congress cannot create the authority itself – the result that the ICRA amendments purported to accomplish.

ARGUMENT

I. BECAUSE THE ICRA AMENDMENTS DO NOT DELEGATE FEDERAL PROSECUTORIAL AUTHORITY, RESPONDENT'S DOUBLE JEOPARDY CLAIM FAILS. THE QUESTION WHETHER CONGRESS CAN "RESTORE" INHERENT TRIBAL AUTHORITY SHOULD NOT BE ADDRESSED.

A.

Deeply rooted in this Court's double jeopardy jurisprudence is the dual sovereignty doctrine "founded on the common-law conception of crime as an offense against the sovereignty of the government." *Heath v. Alabama*, 474 U.S. 82, 88 (1985). Thus, "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'" *Id.*; *see, e.g.*, *Fox v. Ohio*, 46 U.S. (5 How.) 410, 435 (1847). The controlling consideration under the doctrine is whether "the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns." 474 U.S. at 88; *accord United States v. Dixon*, 509 U.S. 688, 725 (1993).

This Court recognized the doctrine's applicability with respect to successive tribal and federal prosecutions in *United States v. Wheeler*, 435 U.S. 313 (1978). There, it rejected a double jeopardy defense raised by a Navajo Nation member to a federal prosecution for statutory rape under 18 U.S.C. §§ 1153 and 2032 after he had been convicted in tribal court under Navajo law for disorderly conduct and contributing to the delinquency of a minor. The Court's determination was premised on the conclusion that "the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status" (435 U.S. at 326) and that Congress had not elected to remove such power (*id.* at 328). Under those circumstances, the tribe in prosecuting its member "d[id] so as part of its retained sovereignty and not as an arm of the Federal Government." *Id.*

In light of *Wheeler* and other dual sovereignty decisions, the double jeopardy inquiry must focus whether the ICRA amendments delegated federal power in the form of criminal jurisdiction to tribes over Indians who are not their members, as the Eighth Circuit held, or whether those amendments were directed at "restor[ing]" (Pet. (I)) the retained inherent authority found absent in *Duro*. If no delegation is found, then the double jeopardy claim fails regardless of whether the amendments were successful in achieving their object of filling the "jurisdictional gap" purportedly left by *Duro*. This fact would render further litigation over the amendments' constitutionality nonjusticiable, since the court of appeals' judgment must be reversed once the amendments are construed not to have effected a delegation of federal prosecutorial power. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)

("[a] justiciable controversy is . . . distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot"); *cf. Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 93 (1998) (rejecting use of "hypothetical jurisdiction" to resolve merits of claim in lieu of determining subject matter jurisdiction issue). Relief in the effective form of an advisory opinion, needless to say, is inappropriate. *FEC v. Akins*, 524 U.S. 11, 24 (1998).

B.

This Court has recognized a canon of construction that favors one construction of a statute over another to avoid resolving difficult constitutional issues. *E.g.*, *Kent v. Dulles*, 357 U.S. 116, 130 (1958); *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 216 n.2 (1995) (entertaining construction not offered by party before lower courts where the proposed "reading of the statute would avoid a constitutional question of undoubted gravity"). The court of appeals applied a variant of this canon in deeming the amendments to be a delegation of federal authority, reasoning that they would be invalid if construed to "have the effect that they plainly sought to achieve." Pet. App. 10a.[4] Canons

[4] The Eighth Circuit was not the first court to follow that analytical path. In *Means v. Northern Cheyenne Tribal Court*, 154 F.3d 941 (9th Cir. 1998), a majority of a Ninth Circuit panel also found delegation on the ground that "[w]hile the legislative history of this section suggests that Congress did not intend to delegate such authority to the tribes, that is essentially the amendments' effect." *Id.* at 946. One panel member concurred in the judgment but disagreed with this aspect of the opinion. *Id.* at 950 (Reinhardt, J., concurring). The construction of

(Continued on following page)

of construction nevertheless may not be employed as an end-run around otherwise unambiguous text. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). They are, as the Court has stressed quite recently, merely "designed to help judges determine the Legislature's intent as embodied in particular statutory language." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). The Eighth Circuit's implicit application of the canon in favor of construing statutes to reach a constitutional result breached this fundamental limitation.

This Court also reiterated in *Chickasaw Nation* that "[s]pecific canons 'are often countered . . . by some maxim pointing in a different direction.'" 534 U.S. at 94. That admonition has special force here. The court of appeals acknowledged that Congress "plainly sought" to invest tribes with inherent authority that this Court found absent in *Duro*. Pet. App. 10a. Its acknowledgment was unsurprising, since the amendments expressly stated so by their recognition and affirmance of the "inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2). The term "inherent power" was not used casually and had unmistakable reference to a settled body of decisional law developed during the preceding dozen years that explored the scope of inherent tribal authority over members and nonmembers, including most prominently *Oliphant*, *Wheeler*, and *Duro*. *See also Montana v. United States*, 450 U.S. 544, 564 (1981); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 425-26 (1989) (plurality op.).

the amendments adopted in *Means* was overruled subsequently by the *en banc Enas* court. 255 F.3d at 675 n.8.

The explicit use of "inherent power," together with incongruence of "recogniz[ing] and affirm[ing]" *delegated* power, leaves no reasonable doubt in this respect. *Means*, 154 F.3d at 950 (Reinhardt, J., concurring). The Eighth Circuit thus ignored a canon of construction that had direct relevance, namely, "'that [w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *Field v. Mans*, 516 U.S. 59, 69 (1995) (some internal quotation marks omitted); *see also Morisette v. United States*, 342 U.S. 246, 250 (1952).

Even were there ambiguity in the text of the amendments, crystal clear legislative history eliminates any question over their proper interpretation. The review of such history above leaves no doubt concerning congressional awareness of the difference between inherent tribal and delegated federal power, particularly in the context of criminal jurisdiction, and it carefully chose a path that, if controversial as a constitutional matter, was preferred from a policy perspective. *See also Enas*, 255 F.3d 669-70 (summarizing legislative history); *Means*, 154 F.3d at 950-51 (Reinhardt, J., concurring) (same). Indeed, the *en banc* majority below knew full well the import of the amendments given their text and the unequivocal legislative history, quoting as it did from *United States v. Weaselhead*, 156 F.3d 818, 823 (8th Cir. 1998), for the proposition that "[t]he ICRA amendments are 'a legislative enactment purporting to recast history in a manner that that alters the Supreme Court's stated understanding of the organizing principles by which the Indian tribes were incorporated into our constitutional system of government.'" *Weaselhead*, in turn, had remarked that "Congress's intent

to do so is plain from the legislative history." *Id.* at 823 n.4.[5]

The court of appeals consequently realized that the ICRA amendments embodied a direct and unqualified reversal of *Duro* but elected to construe around what it viewed as the unconstitutionality of the actual method used to effect the reversal; *i.e.*, it understood that Congress sought to fill the perceived *Duro*-induced "jurisdictional gap" by overruling the very rationale of this Court's decision and thereby restoring the *status quo ante*. This attempt to circumvent a deliberate congressional choice is unfaithful to amendments' text and cannot stand. It is instead plain that no transfer of federal authority was made under the amendments and that jeopardy did not attach by virtue of Respondent's tribal court conviction. The court of appeals' judgment therefore must be reversed, and analysis of the amendments' constitutionality should await an appropriate challenge by a nonmember Indian to a tribal court criminal judgment.

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[5] The three-judge panel opinion in *Weaselhead* was vacated, and on *en banc* rehearing the district court judgment, which the panel had reversed, was affirmed by an equally divided vote. *United States v. Weaselhead*, 165 F.3d 1209 (8th Cir.), *cert. denied*, 528 U.S. 829 (1999).

II. CONGRESS LACKED AUTHORITY UNDER THE INDIAN COMMERCE CLAUSE TO CONFER RETAINED INHERENT AUTHORITY ON TRIBES.

The United States' arguments concerning the scope of Congress' power, if considered,[6] parallel the reasoning in the Ninth Circuit's *Enas* decision. It contends like the *Enas* principal opinion (255 F.3d at 670) that *Duro* embodies nothing more than nonconstitutionally-based federal common law subject to modification by Congress pursuant to its "plenary" Indian Commerce Clause power. The United States thus argues that (1) "to the extent that Congress has not spoken directly to the issue, tribal sovereignty has been treated as a matter of federal common law" (Pet. 13); (2) "[i]n *Duro*, this Court assessed the extent of tribal criminal jurisdiction by reference to non-constitutional sources, including statutes, treaties, and federal court practice" (*id.* 14); and (3) "[t]he Court has recognized that Congress may, in the exercise of its 'plenary'

[6] Notwithstanding their position that Congress' power to confer retained inherent authority should not be addressed, the *amici* States discuss the amendments' validity because it is placed specifically at issue in the question presented as to which *certiorari* has been granted and because of its importance. The States' analysis does not consider the two other constitutional issues identified above: Whether Congress may subject citizens to the criminal jurisdiction of extraconstitutional entity not bound by the Constitution, and whether the ICRA amendments discriminate on the basis of ancestry, or race. *See Morris v. Tanner*, No. CV 99-82-M-DWM, 2003 WL 22439854 (D. Mont. Oct. 28, 2003) (ICRA habeas corpus proceeding challenging tribal court conviction on racial discrimination, due process, and separation of power grounds). These issues were not raised below by Respondent, presumably because his double jeopardy claim could succeed only if the amendments were deemed a valid delegation of federal authority.

authority over Indian affairs, . . . remove constraints that federal common law would otherwise impose on Tribes' exercise of their sovereign powers" (*id.*). Like the *Enas* concurring opinion (255 F.3d at 679-80, 682 n.8), it goes one step further, contending that "[e]ven if the constraints on the Tribes' exercise of sovereign powers were viewed a deriving from understandings or default rules reflected in the Constitution, it would not necessarily follow . . . that Congress could not authorize an exercise of power that the Tribes would otherwise lack." *Id.* 16. As support for the last proposition, the United States analogizes congressional power to negate the preemptive impact of the dormant Interstate Commerce Clause on state authority through affirmative legislation. *Id.*

Although the analytical predicates for the federal position are unsound, perhaps its most striking feature is the ultimate result: Not only does Congress have the power to nullify this Court's determinations as to whether certain actions fall within a tribe's retained inherent authority, but it also has the *final* say, so that the congressional assessment of "non-constitutional sources" or "understandings or default rules reflected in the Constitution" is not subject to substantive judicial review. The Indian Commerce Clause does not sanction this extravagant view of congressional power.

A.

This Court held in *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985), that "[t]he question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by

reference to federal law and is thus a 'federal question' under [28 U.S.C.] § 1331." 471 U.S. at 852. While the Court's framing of the question was specific to the controversy before it – whether a tribal court possessed jurisdiction over a personal injury claim arising on a state school district's land – it cited *Oliphant* in support of the general statement that the tribal authority issue must be decided with reference to federal law. *Id.* at 852 n.14. The Court continued on to distinguish the categorical rule where criminal jurisdiction over non-Indians is at stake with the more flexible analysis required where civil authority is contested. *Id.* at 855-56 ("the existence and extent of a tribal court's [civil] jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions"). Notwithstanding this critical difference, *National Farmers* removed any doubt that the decisional calculus as to the existence of retained inherent tribal authority as to either civil or criminal jurisdiction is judge-made and federal law-based.

National Farmers additionally repeated the settled precept that "the power of the Federal Government over the Indian tribes is plenary" (471 U.S. at 851) and cited several decisions for that rule (*id.* at 851 n.10). None of those cases stood for the notion that Congress may "restore" retained inherent authority but rather, to the extent they were concerned with tribal power, reflected instances of actual or alleged "'defeasance by Congress'" of such power. *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 788 n.30 (1984) (licensing of hydropower facilities on Indian lands); *Rice v. Rehner*,

463 U.S. 713, 719 (1983) (control of reservation liquor transactions); *Wheeler*, 435 U.S. at 323 (criminal jurisdiction over member Indians). The lack of citation to cases finding congressional ability to confer inherent authority comes as no surprise, since the ICRA amendments appear to be the first instance where Congress has attempted to do so.

This Court's analysis in *National Farmers* provides the framework against which the validity of the revised "powers of self-government" definition must be measured. It succinctly identified the separate functions that the Judicial and Legislative Branches heretofore have played where inherent tribal authority is at stake. Committed to the judiciary is the question whether inherent authority is "retained" by tribes; committed to Congress is the question whether that authority, if otherwise extant, should remain "retained." The United States, however, essentially contends that Congress can assume pursuant to its Indian Commerce Clause power the duties traditionally discharged by the courts and thus discharge *both* roles even to the point of legislatively vetoing a decision by this Court. That contention is incorrect.

B.

1. The United States' reliance on the principle that Congress may displace federal common law rules not constitutionally based is misplaced. This principle derives from the recognition that "[f]ederal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981). Federal common law typically is created

to fill a vacuum that could be, but has not been, occupied congressionally. *Id.* at 313. As a consequence, that judge-made law "is 'subject to the paramount authority of Congress'" to modify or eliminate. *Id.* at 313; *see also id.* at 314 ("when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears"). Particularly noteworthy is the fact that these standards have been developed primarily in a preemption context – *i.e.*, the creation of judge-made law to override application of state law as the rule of decision – where congressional power to act was uncontested. *Id.* at 313; *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754-55 (1998); *Atherton v. FDIC*, 519 U.S. 213, 218-19 (1997); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981).

The situation here differs markedly. First, no concern exists over whether a state rule of decision is appropriate. The determination in *National Farmers*, as it had been earlier in *Oliphant* and would be later in *Duro*, resulted from an *interpretative* exploration of federal law-based factors, including constitutional requirements, statutory provisions, common law principles and Executive Branch practice, to determine whether tribal power to hold persons other than their own members criminally liable had been implicitly divested by virtue of their status as domestic dependent nations. The *Duro* Court thus was not attempting to fill in a remedial void left by Congress and susceptible to a state-law rule of decision. The Court instead was carrying out the exclusive function of "the judicial department to say what the law is" (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The constitutionally preeminent role of the judiciary in this regard was

unaffected by whether the "law" at issue derived from application of the Constitution, a federal statute, common law, executive policy, or a combination of the four. *Williams v. Taylor*, 529 U.S. 362, 378-79 (2000); *see also Plaut*, 514 U.S. at 222 ("The essential balance created by this allocation of authority was a simple one. The Legislature would be possessed of power to 'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,' but the power of '[t]he interpretation of the laws' would be 'the proper and peculiar province of the courts'") (quoting *The Federalist* No. 78, at 523, 525 (J. Cooke ed. 1961)).

Second, implicit in the "paramount authority" of Congress is presence of the claimed authority itself. No one disputes that Congress lacks power to overrule this Court's constitutional interpretations. *E.g.*, *Dickerson v. United States*, 530 U.S. 428, 437 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 518-19 (1997). Plainly enough, the reason is that congressional power must be exercised consistently with constitutional constraints and that Congress is bound by the Judicial Branch's construction of the Constitution. *See United States v. Lopez*, 514 U.S. 549, 566 (1995) ("The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation. . . . Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the Judiciary's duty 'to say what the law is'") (citation omitted). Congress similarly may not overrule a judicial construction of a statute, although it may revise the statute itself in response to the construction in anticipation that it will be interpreted differently than the original law. *E.g.*, *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 438 (1992) (no separation of powers violation where

statute "compelled changes in law, not findings or results under old law"); *cf. Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-33 (1994) ("[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction"); *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) ("[i]t is . . . correct that Congress, not the courts, must define the limits of patentability; but it is equally true that once Congress has spoken it is 'the province and duty of the judicial department to say what the law is'"). Consequently, reliance here on the notion that Congress may overrule "federal common law" rules is misplaced where Congress has attempted to reverse this Court's *interpretation* of the complex interaction of the Constitution, statutes, Executive Branch practice, and the unique relationship of Indian tribes with the Federal Government and the States, and not to modify the positive law to which the interpretation was directed.

2. Once Congress' power to set aside prospectively certain forms of federal common law is dismissed as a basis to sustain the ICRA amendments, the real issue presented by the United States' position becomes clear: Whether the Indian Commerce Clause embodies a grant of congressional power sufficient to allow Congress to "restore" retained inherent authority either generally or in the face of a contrary decision by this Court. The Court's reasoning in *Oliphant* and *Duro* establishes that the very nature of such authority is incompatible with the claimed congressional restoration.

In concluding that tribes lack criminal jurisdiction over non-Indians, the *Oliphant* Court engaged in a two-part analysis. The first part examined various treaties, statutes, federal court decisions, and Executive Branch

and congressional documents found relevant to the issue. 435 U.S. at 198-205. The second part is more crucial here because, although "the shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians carrie[d] considerable weight" (*id.* at 206), this Court ultimately relied on "our earlier precedents"[7] for the black-letter holding that "Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress." 435 U.S. at 208. Those precedents established that "[u]pon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty." *Id.* at 209. This divestiture of retained authority was not "limited only by specific restrictions in treaties or congressional enactments" (*id.* at 208); rather, "[b]y submitting to the overriding sovereignty of the United States, Indian tribes . . . *necessarily* gave up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress" (*id.* at 210) (emphasis supplied). That conclusion was premised on the Bill of Rights and the accompanying "great solicitude [of the United States] that its citizens be protected by the United States from unwarranted intrusions on their personal liberty." *Id.* Any other result, this Court reasoned, "would belie the tribes' forfeiture of full

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[7] *United States v. Kagama*, 118 U.S. 375 (1886); *Ex parte Crow Dog*, 109 U.S. 556 (1883); *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 84 (1810).

sovereignty in return for the protection of the United States." *Id.* at 211. Tribes lack retained inherent criminal jurisdiction over non-Indians, in sum, as an essential incident of their dependent status, and not because of any particular congressional action or set of actions. Simple logic dictates that Congress can take no action to "restore" inherent authority that it has never possessed or divested through specific legislation capable of repeal.[8]

The holding in *Duro* was "compelled" by the "rationale" of *Oliphant* and *Wheeler*. *Duro*, 495 U.S. at 685. The aspect of the latter cases that this Court found controlling was the principle "the retained sovereignty of the tribes is that needed to control their own internal relations[ ] and to preserve their own unique customs and social order." *Id.* The Court deemed *Wheeler* singularly germane because it "rested on the premise that the prosecution was part of the tribe's *internal* self-governance" – a premise which led to the conclusion that "[h]ad the prosecution been a manifestation of external relations between the Tribe and outsiders, such power would have been inconsistent with the

[8] This case does not present an instance where otherwise existing inherent tribal authority has been divested through an act of Congress. *See United States v. Long*, 324 F.3d 475, 483 (7th Cir.) (tribal court of terminated but later restored tribe possessed inherent criminal jurisdiction over member; distinguishing the ICRA amendments as presenting the question "whether Congress could *create* inherent sovereign powers that the Supreme Court had earlier concluded Indian tribes did not possess[,]" while in the case at hand "Congress merely sought to restore to the Menominee that which it had taken from the Tribe earlier"), *cert. denied*, 72 U.S.L.W. 3225 (U.S. Oct. 6, 2003) (No. 1801). ICRA itself is a specific limitation on inherent tribal authority, whose repeal would "restore" such authority to the scope existing as of the law's enactment in 1968.

Tribe's dependent status, and could only have come to the Tribe by delegation from Congress, subject to the constraints of the Constitution." *Id.* at 686. It added later in the opinion that "[t]he retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members." *Id.* at 693. Although the Court did address the respondents and *amicus curiae* United States' reliance on "history" for a contrary holding in the third part of the opinion (*id.* at 688-92), the basis for the decision derived not from that analysis, which was made *after* the case effectively had been decided, but from the *Oliphant* determination that tribes had been divested of criminal jurisdiction as a necessary incident of their dependent status. Congress accordingly has no more power to "restore" retained inherent authority for criminal prosecution purposes where nonmember Indians are the subject population than it does where non-Indians are.

Congress' plenary authority under the Indian Commerce Clause does not change this result. Congressional power over Indian affairs is unquestionably broad (*e.g.*, *Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996)), yet it does not encompass the right to "restore" authority that, by its very nature, existed long before Congress came into being and whose only source is the entity to which it is allegedly "restored." Once again, Congress can repeal a statute that divested or limited some form of retained authority, but in that instance it merely removes a statutory obstacle to the exercise of a power that it neither did nor could confer. It is for this reason that the United States' analogy to Congress' ability to remove the preemptive impact of the dormant Interstate Commerce Clause fails. While Congress can authorize the States to exercise their inherent police powers notwithstanding the impact

on commerce, it cannot *create* the underlying police power.[9] Such authorization, moreover, is fully consistent with the discrete roles played by the Judicial and Legislative Branches, since the congressional action does not "call into question the Court's interpretation of the Constitution" or "challenge the constitutional rule." Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 56 n.239 (1985). The ICRA amendments stand in studied contrast given their explicit purpose of overturning this Court's understanding concerning the scope of the inherent authority retained by tribes as of the Constitution's adoption and ratification.

[9] The United States' suggestion that the reference to "delegation" in *Duro* or elsewhere includes "delegating" retained inherent authority suffers from the same flaw. Pet. 15 n.2. Congress cannot "delegate" what it does not have in the first place. It is thus plain that *Duro*'s references to congressional "delegation" (*Duro*, 495 U.S. at 686, 694) related specifically back to *Wheeler* and the question decided there: "Is [the power to punish tribal offenders] a part of inherent tribal sovereignty, or an aspect of the sovereignty of the Federal Government which has been delegated to the tribes by Congress?" *Wheeler*, 435 U.S. at 322. This conclusion also is compelled by the Court's requiring any delegation of criminal jurisdiction to be "subject to the constraints of the Constitution" (*Duro*, 495 U.S. at 686) – a requirement that cannot be satisfied through "delegation" of inherent authority given the tribes' extra-constitutional status. *See id.* at 693 (discussing the unique nature of tribal prosecutions and the fact that ICRA "provides some statutory guarantees of fair procedure . . . [which] are not equivalent to their constitutional counterparts").

CONCLUSION

The judgment of the Court of Appeals should be reversed without reaching the constitutionality of the ICRA amendments.

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

BILLY JO LARA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICI CURIAE* ON BEHALF OF EIGHTEEN AMERICAN INDIAN TRIBES

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November 14, 2003

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38

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD INDIAN RESERVATION OF MONTANA,
CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON,
EASTERN BAND OF CHEROKEE INDIANS OF NORTH CAROLINA,
LAC COURTE OREILLES TRIBE OF WISCONSIN
LUMMI NATION OF WASHINGTON
MENOMINEE TRIBE OF WISCONSIN,
METLAKATLA INDIAN COMMUNITY OF ALASKA,
MISSISSIPPI BAND OF CHOCTAW INDIANS,
MOHEGAN TRIBE OF CONNECTICUT,
NEZ PERCE TRIBE OF IDAHO,
OGLALA SIOUX TRIBE OF SOUTH DAKOTA,
PASCUA YAQUI TRIBE OF ARIZONA,
PAWNEE NATION OF OKLAHOMA,
PUEBLO OF LAGUNA OF NEW MEXICO,
PUEBLO OF SANTA CLARA OF NEW MEXICO,
SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY OF ARIZONA,
SPIRIT LAKE SIOUX TRIBE OF SOUTH DAKOTA
THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION OF NORTH DAKOTA

QUESTION PRESENTED

Whether Section 1301 of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301, as amended, validly recognizes and affirms the Tribes' inherent sovereign power to prosecute members of other Tribes (rather than delegates federal prosecutorial power to the Tribes), such that a federal prosecution following a tribal prosecution for an offense with the same elements is valid under the Double Jeopardy Clause of the Fifth Amendment.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. SECTION 1301 OF THE INDIAN CIVIL RIGHTS ACT PROPERLY RECOGNIZES THAT INDIAN TRIBES ARE THE LAWFUL AND MOST APPROPRIATE AUTHORITIES TO HANDLE MISDEMEANOR OFFENSES COMMITTED BY ALL INDIANS ON THEIR RESERVATIONS	4
A. The Facts of This Case Demonstrate Why The Spirit Lake Tribe Needs to Exercise Inherent Criminal Jurisdiction Over All Indians Who Commit Misdemeanors on Its Reservation	4
B. Tribes Throughout Indian Country Need Authority to Prosecute All Indians Who Commit Crimes Within Their Indian Communities And Are Well-Suited To Exercise Such Authority	8
1. On-Reservation Crime is a Serious Problem Throughout Indian Country	9
2. From their Historical Roots, Modern Tribal Courts Have Made Great Progress	12

TABLE OF CONTENTS—Continued

	Page
3. Congress Has Recognized that Tribal Courts Are Well-Suited to Enforcing Criminal Laws and Protecting Tribal Communities	15
II. SECTION 1301 OF THE ICRA PROPERLY ADDRESSES THE JURISDICTIONAL VOID CREATED BY THE *DURO* DECISION AND RECOGNIZES THAT TRIBES HISTORICALLY EXERCISED INHERENT CRIMINAL JURISDICTION	17
A. The Jurisdictional Void Created by the *Duro* Decision Caused A Serious Crisis in Law Enforcement on Indian Reservations	17
1. Duro Created a Jurisdictional Void	17
2. The Vacuum Extended Even to Major Crimes	20
3. Congress was Asked by Many Law Enforcement Agencies at All Levels to Take Action	20
B. Congress Reviewed the Historical Record and, Contrary to the Court's Decision in *Duro*, Recognized and Affirmed the Inherent Powers of Indian Tribes	22
C. Subsequent Analysis of The Historical Record, Particularly Of The Solicitor's Opinions Relied Upon By the Court In *Duro*, Comports With Congress' Conclusion	24
CONCLUSION	29

TABLE OF AUTHORITIES

CASES

	Page
Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965)	14
Duro v. Reina, 495 U.S. 676 (1990)	*passim*
Ex Parte Crow Dog, 109 U.S. 556 (1883)	23, 24
Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987)	16
United States v. Rogers, 45 U.S. (4. Hou.) 567 (1846)	3, 23
Worcester v. Georgia, 331 U.S. (6 Pet.) 515, 531 (1832)	3

STATUTES AND EXECUTIVE MATERIALS

18 U.S.C. § 1152	18, 24
18 U.S.C. § 1153	18, 20, 24
25 U.S.C. §§ 1301-1341	*passim*
25 U.S.C. § 1302(7)	9
25 U.S.C. § 3601	15
25 U.S.C. § 3601(2)(5)	15
Act of Mar. 3, 1817, 3 Stat. 383	23
Act of June 30, 1834, ch. 161 4 Stat. 733	23
25 C.F.R. 11	14
25 C.F.R. 11.2(a)	14
25 C.F.R. 11.2(c)	14
25 C.F.R. 11.100	14
1 Op. Sol. 445 (October 25, 1934)	25, 26, 27
1 Op. Sol. 699 (November 17, 1936)	28
1 Op. Sol. 736 (March 17, 1937)	28
1 Op. Sol. 849 (August 26, 1938)	28
1 Op. Sol. 859 (October 25, 1938)	29
1 Op. Sol. 872 (February 17, 1939)	29

TABLE OF AUTHORITIES—Continued

Page

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Spirit Lake Const. art. VI, sec. 4 6
Spirit Lake Tribal Court, Statement of Rights..... 7
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LEGISLATIVE MATERIALS

S. Rep. No. 102-153 (1991)..... 24
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MISCELLANEOUS

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Page

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INTEREST OF *AMICI CURIAE* [1]

Amici are the Spirit Lake Sioux Tribe of North Dakota (the situs of the instant case) and the following eighteen tribes:

> Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation of Montana, Confederated Tribes of the Warm Springs Reservation of Oregon, Eastern Band of Cherokee Indians of North Carolina, Lac Courte Oreilles Tribe of Wisconsin, Lummi Nation of Washington, Menominee Tribe of Wisconsin, Metlakatla Indian Community of Alaska, Mississippi Band of Choctaw Indians, Mohegan Tribe of Connecticut, Nez Perce Tribe of Idaho, Oglala Sioux Tribe of South Dakota, Pascua Yaqui Tribe of Arizona, Pawnee Nation of Oklahoma, Pueblo of Laguna of New Mexico, Pueblo of Santa Clara of New Mexico, Salt River Pima-Maricopa Indian Community of Arizona, and the Three Affiliated Tribes of the Fort Berthold Reservation of North Dakota.

All amici tribes have inherent criminal jurisdiction over all Indians, regardless of tribal affiliation, who violate tribal law within their reservations as explicitly recognized and affirmed by the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301, as amended. As Section 1301 is the central subject of this litigation, and its meaning, reach and scope are likely to be determined by this Court, amici have a substantial interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Tribal governments throughout the Nation are responsible for the peace and safety of their reservation communities, just as the Spirit Lake Tribe was—the Tribe which prosecuted

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[1] Petitioner and Respondent have consented to the filing of this Brief, and their consents are filed herewith. No counsel for a party authored this brief in whole or in part. No person or entity, other than Amici, their members or their counsel made a monetary contribution to the preparation and submission of this brief.

Billy Jo Lara in this case. As at Spirit Lake, most of the residents in Indian communities are tribal members, but in each community there are some Indians from other tribes. These Indians choose to live as a part of other tribes' Indian communities for various reasons—marriage or relationships with tribal members, employment on the reservation, or otherwise.

When these Indians commit minor offenses in their communities, the tribe in charge of that community is often the only entity with the legal authority and the resources to deal with these offenders. Federal authorities generally lack jurisdiction over misdemeanor crimes by Indians on Indian reservations, and the large majority of states lack jurisdiction over all crimes committed by Indians on Indian reservations. And even when the federal government or the states do have jurisdiction over such misdemeanor crimes committed by Indians on Indian reservations, they often lack the resources and/or incentive to respond to them.

Legal technicalities aside, if anyone is going to deal with minor offenses committed by the Indians living in their communities, there is no practical or better alternative but the tribes. Tribes are the best alternative in that they have a special responsibility for peace on the reservation, are closest to the scene of the crimes, and often know the people involved. Also, thanks to major assistance from a variety of congressional programs, tribes have acquired capable and up-to-date judicial systems. Like the Spirit Lake Tribe, many have criminal codes, police forces, prosecutors, and judicial systems. Their misdemeanor codes are usually similar to those of the surrounding states and municipalities. Prosecutions are subject to the constitutional rules extended by the Indian Civil Rights Act to Indian courts, and some tribes go even beyond that, for example by furnishing free counsel to indigent defendants.

Amici believe that tribal jurisdiction to keep the peace in their communities is appropriate for the benefit of all members of the community—and urge this Court to confirm Congress' actions recognizing that tribes retain their inherent jurisdiction over non-member Indians, a power they historically had until this Court's 1990 decision in *Duro v. Reina*, 495 U.S. 676 (1990).

In *Duro*, this Court held that tribes had lost their jurisdiction over non-member Indians,[2] mainly because Congress had never recognized it. After the decision, Congress proceeded to expressly recognize it by amending the Indian Civil Rights Act of 1968 to affirm tribes' inherent criminal jurisdiction over all Indians (the "ICRA Amendment"). One question here is whether Congress had the constitutional power to do so. Both the United States and amicus National Congress of American Indians demonstrate that they did. We support these arguments and do not repeat them here.

What we do address are the following points, which we hope the Court will find helpful in its analysis of the issues. First, we recite the full set of facts of what happened on the Spirit Lake Reservation to illustrate the seriousness of the problem of on reservation crime and the need for the tribal government to deal with it. Second, we show that with federal assistance, tribal law enforcement systems are making great strides in capability. Third, we show the flood of compelling evidence Congress had before it when it affirmed tribes' inherent misdemeanor jurisdiction over all Indians, including evidence of the law and order crisis that occurred on reservations in the wake of the *Duro* decision. This evidence persuaded the Justice Department to support the

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[2] In this brief, the term "non-member Indian" is used guardedly because, historically, Indian reservations were tribal communities whose members included all Indians. *Worcester v. Georgia*, 331 U.S. (6 Pet.) 515, 531 (1832); *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846). Historically, tribal membership was not defined by a stiff and formal enrollment standard.

ICRA Amendment, as did many Western states with large Indian populations and law enforcement groups. We also review the historical record before Congress, based on which it arrived at a different conclusion than the Court's in *Duro*. Finally, we review the five Interior Solicitor's Opinions, which this Court concluded in *Duro* were ambivalent, and suggest that this Court reconsider them. The 1934 Solicitor Opinion, *The Power of Indian Tribes*, is clear that tribes have always had jurisdiction over non-member Indians enrolled elsewhere, and the four minor ones are not inconsistent with that.

Taken as a whole, the legislative record amply justifies Congress' decision to "recognize and affirm" the inherent right of tribes to exercise criminal jurisdiction over all Indians.

ARGUMENT

I. SECTION 1301 OF THE INDIAN CIVIL RIGHTS ACT PROPERLY RECOGNIZES THAT INDIAN TRIBES ARE THE LAWFUL AND MOST APPROPRIATE AUTHORITIES TO HANDLE MISDEMEANOR OFFENSES COMMITTED BY ALL INDIANS ON THEIR RESERVATIONS

A. The Facts of This Case Demonstrate Why the Spirit Lake Tribe Needs to Exercise Inherent Criminal Jurisdiction Over All Indians Who Commit Misdemeanors on its Reservation

Billy Jo Lara, an enrolled member of the Turtle Mountain Band of Chippewa Indians of North Dakota, chose to become a member of the Spirit Lake Tribe's community in North Dakota. He married an enrolled member of the Spirit Lake Tribe, moved onto the Reservation, and fathered at least two children who are also enrolled members of the Spirit Lake Tribe. As an Indian member of the Spirit Lake tribal

community, Mr. Lara was provided with a multitude of opportunities and services available to all Indians, such as health services, housing, commodities, job services, and many others.

Unfortunately Mr. Lara was not a model citizen of the Spirit Lake tribal community. As tribal court records show, Mr. Lara began causing trouble in the community as early as 1999. From that time on, these records show, Mr. Lara has repeatedly committed offenses of domestic abuse, public intoxication, and resisting arrest. According to his wife's testimony, his threats and violence against her reached such a point that she eventually had to flee the Reservation and seek safety in an out-of-state shelter. In order to protect the tribal community, the Tribe turned to the federal government to ask for help with Mr. Lara, but the federal government refused to prosecute him.

In response, the Tribal Council turned to one of its most extreme remedies—exclusion. On September 22, 2000, after hearing and testimony, the Spirit Lake Tribal Council passed a Resolution ordering the removal and exclusion of Mr. Lara from the Spirit Lake Reservation. *Spirit Lake Tribal Resolution*, No. A05-00-239 (Sept.22, 2000).

This Court has approved the exclusion power as an appropriate remedy for tribes. *See Duro v. Reina*, 495 U.S. 676, 696-97 (1990) ("[t]he tribes also possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands."). As this case shows, however, the exclusion power alone is not a practical way to preserve order among those who live on their reservations.[3]

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[3] Exclusion is not a simple or rapid remedy. Additionally, exclusion is undesirable because it often unravels the fabric of the community. Among the tribes who responded to a 103 tribe survey commissioned by the National Congress of America Indians in 1991, 89 percent reported they did not feel that exclusion or removal of non-members was a workable solution to the lack of criminal jurisdiction over them because of

Indeed, the very incident bringing Mr. Lara before this Court arose from attempts to enforce a violation of the exclusion order against him.

On the night of June 13, 2001, Mr. Lara violated the exclusion order and entered the Reservation. In response to complaints, police officers were called out. Finding Mr. Lara clearly intoxicated, the responding officers, a tribal police officer and a BIA officer, attempted to arrest him for public intoxication and an outstanding arrest warrant. Struggling against arrest, Mr. Lara struck one of the officers. Once at the police station, officers advised Mr. Lara that there was an exclusion order against him issued by the Spirit Lake Tribe. As the police report shows, Mr. Lara responded to this information by striking the other officer—a blow which left him unconscious.

The Spirit Lake Constitution recognizes the Tribe's inherent authority to "enact ordinances to regulate the conduct and domestic relations of the members of the tribe, *or Indians from other tribes on the Reservation*." Spirit Lake Const. art. VI, sec. 4 (emphasis added). Pursuant to this authority, the Tribe charged Mr. Lara with resisting lawful arrest, public intoxication, and violence to a police officer—all violations under the Spirit Lake Law and Order Code.

On June 15, 2001, after being fully informed of his rights and acknowledging them with his signature, Mr. Lara pleaded guilty in tribal court to all three charges.[4] He was ordered

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the extent to which non-members had integrated into the Indian community on the reservation. The most common reasons for this were the extensive intermarriage between tribal members and non-members, the large number of nonmember children, and the large number of non-members working on the reservation. S. Rep. No. 102-168, App. E (1991).

[4] Before pleading to any charges, Mr. Lara was advised, in writing, that: "You are not required to say anything or answer any questions and anything that you choose to say may be used against you in a subsequent proceeding. As a defendant, you are presumed innocent and you are entitled to the following rights: 1. The right to be given an explanation of the charges against you. 2. The right to be represented by an attorney of your own choosing at your own in [sic] expense in all subsequent proceedings. 3. You have the right to plead 'Not Guilty.'" He was also advised of the maximum penalties the court could impose (up to 6 months in jail and/or a fine up to $500, and that in the event of a trial he had a right to a jury, the right to testify, and that the prosecution had the burden of proof. Spirit Lake Tribal Court, Statement of Rights, signed and dated 6/15/01 by Billy Lara.

to serve 60 days in detention at the Fort Totten Detention Center for resisting arrest, 5 days for the intoxication charge, and 90 days for violence against the police officer. He was not fined or charged costs. Mr. Lara was also charged with violation of the exclusion order but disposition on that charge was deferred.

Shortly following the tribal convictions, the United States indicted Mr. Lara for his offenses against the BIA officer, a federal employee. Mr. Lara moved to dismiss the federal indictment solely on double jeopardy grounds. Importantly, he does not challenge the tribal court conviction, nor does he raise any claim that it was in any way offensive to his personal liberties.

Since the State had no jurisdiction over him, and the federal authorities declined to take any action at the time, the only authority that could handle this series of incidents was the Spirit Lake Tribe itself. The Tribe, on behalf of the community and Mr. Lara's wife and children, had a right to punish Mr. Lara for his criminal behavior, and did so. This right was properly recognized by Congress in Section 1301 of the Indian Civil Rights Act, which states that the "powers of self-government . . . means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301.

B. Tribes Throughout Indian Country Need Authority To Prosecute All Indians Who Commit Crime Within Their Indian Communities And Are Well-Suited To Exercise Such Authority

The story of Spirit Lake and Billy Jo Lara is typical throughout Indian Country. Like Mr. Lara, Indians often choose to come to other tribes' reservations and live in Indian communities. Indians marry and have children with members of other tribes, they live with parents who are members of other tribes, they find employment on other tribes' reservations and so forth. Indians who choose to move to other tribes' reservations are entitled to receive services provided by those other tribes, and by the federal government, to all Indians regardless of tribal affiliation.

As indicated in a survey of 103 tribes conducted by the National Congress of American Indians in 1991(hereinafter "1991 NCAI Survey"), large numbers of Indians living in reservation Indian communities are not members of the local tribes. *See* S. Rep. No. 102-168, App. E (1991). Of the responding tribes, 80 percent reported that non-member Indians were married to tribal members, 92 percent reported that non-member Indians worked on their reservations, and 25 percent reported that non-member Indians held interests in trust or restricted Indian land on their reservations. *Id.*[5] Inevitably, some of these non-member Indians commit minor crimes in the Indian communities they live or work in. As a practical matter, the only workable jurisdictional authority over these Indians for misdemeanor crimes is the tribes themselves.[6]

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[5] One of the largest non-member Indian populations is on the Oglala Sioux Reservation in South Dakota. There are 40,873 member Indians on the Reservation, plus about 9,000 non-member Indians, or about 18 percent.

[6] Crimes prosecuted by Indian tribes are referred to as misdemeanor crimes as the Indian Civil Rights Act limits tribal courts to sentences up to one year in jail and/or $5,000 in fines. 25 U.S.C. § 1302(7)(prior to 1986 the limit was 6 months and/or $500).

1. *On-Reservation Crime is a Serious Problem Throughout Indian Country*

Crime is a major problem on Indian reservations. Crime rates among Indians are between two and three times the national rate. U.S. Department of Justice, Bureau of Justice Statistics, *American Indians and Crime*, NCJ 173386 (Feb. 1999) (hereinafter "*American Indians and Crime*"). And it is a problem that is growing:

> "Serious and violent crime is rising significantly in Indian Country—in sharp contrast to national trends . . . . Nationwide, for example, violent crime has declined significantly between 1992 and 1996. The overall violent crime rate has dropped about 17 percent, and homicides are down 22 percent. For the same time period, however, the BIA reports that homicides in Indian country rose sharply . . . . Other violent crimes, such as gang violence, domestic violence, and child abuse have paralleled the rise in homicides."

Report of the Executive Committee for Indian Country Law Enforcement Improvements, *Final Report to the Attorney General and the Secretary of the Interior* (Oct. 31, 1997) (hereinafter, "*Executive Committee Report*").

By far the most common types of criminal activity reported on reservations, according to the 1991 NCAI Survey, were misdemeanor crimes—disorderly conduct, assault/battery, intoxication, and driving while intoxicated.[7] As reports also show, most of these crimes are related either

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[7] *See also American Indians and Crime* at 3 ("the most common type of violent crime experienced by American Indian victims was simple assault (56%)"); U.S. Department of Justice, Policing on American Indian Reservations, A Report to the National Institute of-Justice, NCJ 188095 at 19 (Jul. 2000) (hereinafter, "*Policing on Reservations*").

directly or indirectly to alcohol. *See* S. Rep. No. 102-168, App. E (1991).[8] Domestic Violence, including child abuse, is also one of the most prevalent of the crimes in Indian country. *See Senate Committee on Indian Affairs Hearing on the Reauthorization of the Indian Child Protection and Family Violence Prevention Act, S. 1601* (Sept. 24, 2003); *see also Extent, Nature, and Consequences of Intimate Partner Violence: Findings From the National Violence Against Women Survey research report*, NCJ 181867 (2000).[9] Other crimes occurring frequently on-reservation are those involving juveniles. Most significant is gang related activity, which is on the rise.[10]

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[8] According to one report in 2000, "Alcohol-related offenses were among the most common, including 17,931 liquor law violations, 19, 092 DWI offenses, and 53,297 incidents of drunkenness." U.S. Department of Justice, Bureau of Justice Statistics, *Tribal Law Enforcement 2000*, NCJ 197936 (January 2003, revised 4/29/03).

[9] According to the National Indian Child Welfare Association:

> "[D]ata reported by the National Child Abuse and Neglect Data System (NCANDS) database reveals that Indian children represent 1.6 percent of substantiated child abuse and neglect cases nationwide, yet are only 1 percent of the population (Child Welfare League of America, 1999) . . . . In fiscal year 1997, the Bureau of Indian Affairs reported 9,040 incidents of child abuse and 19,200 incidents of child neglect for Indian children living on tribal lands (U.S. Department of Interior, 1998). The Bureau of Indian Affairs also reported 4,567 incidents of child sexual abuse for tribes in 1997."

Senate Committee on Indian Affairs Hearing on the Reauthorization of the Indian Child Protection and Family Violence Prevention Act, S. 1601 (Sept. 24, 2003). *See also* Executive Committee Report at Tab B ("According to BIA figures, from 1993 to 1995, child sexual abuse is among the top three crimes reported in Indian country").

[10] Twenty-three percent of the tribes responding to a 2000 survey on gangs in Indian Country reported gang activity in their communities and reported that the vast majority (78 percent) of the gang members were Indians. The types of crimes committed most frequently by these gangs included: graffiti (47 percent); vandalism (40 percent); drug sales (22 percent); and aggravated assault (15 percent). Aline K. Major and Arlen Egley, Jr., *2000 Survey of Youth Gangs in Indian Country*, National Youth Gang Center (NYGC) Fact Sheet (June 2002).

The cumulative effect of these types of crimes can be severely disruptive to the peace and comfort of local Indian communities. Federal and state authorities, however, have no jurisdiction over misdemeanors by non-member Indians. Even where they do have jurisdiction over Indians, they very often lack the resources and the inclination to pay attention to them. As Congress recognized:

> "Crowded dockets of U.S. District Courts do not lend themselves to being 'traffic court' for this category of Indian reservation cases. The vast and often remote areas of which some Indian reservations consist make it difficult and expensive to transport defendants, victims, witnesses and law enforcement officers to handle the arraignments, trials and sentences which are required in the prosecution of such minor offenses."

H.R. Rep. No. 102-61, at 3 (1991). Indeed, after the *Duro* decision, tribes were unable to get help from either federal or state authorities for assistance with these types of crimes. In the wake of the *Duro* decision:

> "tribal governments called upon federal and state law enforcement authorities to assist them in assuring that offenders of Federal law would be prosecuted. However, reports soon came to the Congress that U.S. Attorneys, already overburdened with the prosecution of major crimes, could not assume the caseload of criminal misdemeanors referred from tribal courts for prosecution of non-member Indians. In non-Public Law 280 states, tribal governments were told that the state simply has no authority to exercise criminal jurisdiction. Further, tribal governments reported to the Congress that even in those states which had assumed criminal jurisdictional

> authority under Public Law 280, state law enforcement officers refused to exercise jurisdiction over criminal misdemeanors committed by Indians against Indians on reservation lands."

S. Rep. No. 102-168, at 4 (1991).

Even if federal or state authorities were somehow to acquire the jurisdiction or resources to address such minor offenses, tribes would still be the most effective jurisdictional authority to deal with such offenses. As a practical matter, tribes have the greatest incentive—they know the territory and the people, and their presence fosters deterrence and a sense of community pride and responsibility. As Congress noted:

> "Judicial efficiency is not only promoted when the local tribal court can adjudicate such infractions, but the appropriate deterrent effect and greater community awareness are achieved when the administration of justice on this level occurs within the community where the offenses were committed."

H.R. Rep. No. 102-61, at 3 (1991).

2. *From Their Historical Roots, Modern Tribal Courts Have Made Great Progress*

Modern tribal courts are not much in the news, but they have progressed enormously in the past 30 years. A survey conducted in 2000 reported that there were 246 tribal justice systems in existence. *Survey of Tribal Justice Systems and Courts of Indian Offenses*, May 2000, prepared by the American Indian Law Center for the U.S. Department of the Interior, Bureau of Indian Affairs (hereinafter, "*2000 survey*"). [11] Of the tribes responding to the survey, 78 percent

[11] The report indicated that all tribes with populations over 10,000 had tribal justice systems, and that only 31 of the tribes with populations between 1,000 and 10,000 did not have justice systems. The majority of tribes without justice systems were those with populations under 1,000. 2000 Survey at 44.

had written codes defining their reservation's laws. Of these, nearly 72 percent were modern, "Western-style" codes, which adopted federal, state, and municipal laws. *2000 Survey* at 15, 18. While 75 percent of the tribes did have some laws based on Indian custom, such laws were almost universally applied to tribal members only. *Id.* at 15, 19.

Similarly, tribal justice systems are predominantly "Western-style," patterned after state and federal models. *2000 Survey* at 22. Nearly all tribes (95.3 percent) have an appeals process. *2000 Survey* at 23. Regarding parties' rights, nearly 75 percent have a Bill of Rights incorporated into their codes or constitutions. While not required under the Indian Civil Rights Act, many of the tribal court systems provide indigent defendants with defense attorneys or defense advocates, while others require that the judge assure the protection of defendants' rights. *Id.* at 27. In response to the notion that tribal courts are subject to political interference, the survey report states that "[v]ery few justice systems report political interference with the work of the courts, contrary to the widespread impression fostered by the few bad examples." *Id.* at vii.

Beginning in the 1880's, law enforcement against Indians for minor crimes on reservations other than those of tribes that had their own codes and courts, such as the Five Tribes in Oklahoma, was generally pursuant to the Interior Secretary's Courts of Indian Offenses, an important part of the history of criminal law enforcement systems on Indian reservations. These courts were set up by BIA regulations, under the Secretary's general responsibility for Indian

Affairs.[12] The regulations defined the Court of Indian Offenses's jurisdiction as all offenses when committed by any "Indian," within the reservation, and defined "Indian" as "*any* person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction . . . ."[13] In other words, it covered non-member Indians enrolled elsewhere.

Prior to the passage of the Indian Reorganization Act ("IRA") in 1934, Courts of Indian Offenses were mainly instruments of the BIA, but included inherent tribal power. *See Colliflower v. Garland*, 342 F.2d 369, 379 (9th Cir. 1965). After the IRA was enacted, tribes began setting up their own law and order systems, usually patterned after the old Court of Indian Offenses system, which they superseded. *See* Felix S. Cohen, Handbook of Federal Indian Law, 251 (1982 ed.). The BIA then rewrote the Code of Indian Offenses, which, with minor changes, is still in effect. *See* Cohen at 333. This Code, applicable to those tribes that still had Courts of Indian Offenses, restored a large measure of tribal self-determination to tribal governments, gave tribes a voice in the appointment and removal of judges, and encouraged tribes to supercede the Code with their own laws, which today most tribes have done. *See id.* at 251, 333-34.

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[12] Currently 25 C.F.R. Part 11. These courts were first upheld in 1888, see Felix S. Cohen, Handbook of Federal Indian Law 333 (1982 ed.) (hereinafter "Cohen"). While the validity of Courts of Indian Offenses was later questioned, the fact of repeated congressional appropriations leaves little doubt of their validity. Cohen at 333. Some 45 tribes still have Courts of Indian Offenses. See list in 25 C.F.R. 11.100.

[13] (Emphasis Added) This language appears in the first Code of Federal Regulations, Part 161 (June 30, 1938) (and presumably in earlier regulations going back many years), and the same language was carried forward 25 C.F.R. 11.2(a) and (c) (1993). The quoted clause was dropped in the 1994 edition.

Because they were for the most part patterned after the old Code of Indian Offenses, most current tribal justice systems are based on Anglo-American concepts of civil and criminal law.

> "The Courts of Indian Offenses have had a lasting effect on tribal legal institutions. Almost all tribes have used the BIA code and courts as the starting point for establishing their own courts, police, and written laws. As a result most tribes have courts and codes that are based on Anglo-American concepts of criminal and civil law, separation of powers, and societal rules. For similar reasons many tribal institutions closely resemble one another."

Cohen at 333. Criminal offenses defined in the BIA written Court of Indian Offenses Code, revised in 1935, and in most tribal codes, are the same lesser offenses in any English common law jurisdiction—assault, battery, disorderly conduct, traffic offenses, liquor violations, etc. *Id.*

3. *Congress Has Recognized that Tribal Courts Are Well-Suited to Enforcing Criminal Laws and Protecting Tribal Communities*

Congress has been actively supporting the development of tribal courts. For instance, in 1993, Congress passed the Indian Tribal Justice Act, 25 U.S.C. § 3601, for the purpose of strengthening and improving tribal justice systems. With this Act, one aspect of which authorizes funding for tribal justice systems, Congress expressly recognized that, "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments." 25 U.S.C. § 3601(2)(5). Congress also recognized the capabilities of tribal courts when it enacted the ICRA Amendment:

> "The criminal enforcement system of many tribes, including the Ute Tribe of Utah, the Navajo Nation, the Wind River Tribes, the Confederated Salish and

> Kootenai Tribes of the Flathead Reservation, to name but a few, are composed of law-trained and lay counsel and judges, professional and trained police forces, and impartial and capable appellate panels. According to the Ute Tribe: 'until Duro, the tribe was wholly unaware that its court system or its civil rights protections were somewhow [sic] inadequate or insufficient.' In fact, free counsel is provided to indigent defendants by the Ute court and by many tribal courts elsewhere."

Statement of Sen. Inouye, Cong. Rec. S5223 (Apr. 25, 1991).

For tribal courts to exercise criminal misdemeanor jurisdiction over all Indians in their communities regardless of tribal affiliation is consistent with the longstanding federal policy of encouraging self-governance generally, and tribal courts specifically. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987).

In sum, misdemeanor crime is a serious problem on Indian reservations. Leaving this problem for the federal or state authorities to handle is unworkable due to their lack of legal authority, funding, and incentives. Tribes have the incentive and are the logical jurisdictional authority to deal with misdemeanor crime. Modern tribal law enforcement systems are up to the task. Congress correctly recognized these realities in enacting the ICRA Amendments:

> "The action of the Congress reaffirming the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians on their reservation is premised upon the reality and practice of reservation life: that non-tribal member Indians own homes and property on reservations, are part of the labor force on the reservation, and frequently are married to tribal members. Non-tribal member Indians receive the benefits of programs and services provided by the tribal government. Their children attend tribal schools, and their families receive health care services in tribal hospitals and clinics. Most Indian reservations are located far

> from urban centers, they are geographically isolated and remote, they are separated from state law enforcement by significant distances. The only practical means of providing an immediate law enforcement response to situations arising on the reservation has consistently been found to be that of tribal or local BIA police, with arraignment in tribal court, and confinement in tribal detention facilities."

S. Rep. No. 102-168, at 7 (1991).

II. SECTION 1301 OF THE INDIAN CIVIL RIGHTS ACT PROPERLY ADDRESSES THE JURISDICTIONAL VOID CREATED BY THE *DURO* DECISION AND RECOGNIZES THAT TRIBES HISTORICALLY EXERCISED INHERENT CRIMINAL JURISDICTION.

A. The Jurisdictional Void Created by the *Duro* Decision Caused A Serious Crisis in Law Enforcement on Indian Reservations

In *Duro v. Reina*, Justice Kennedy recognized that "[i]f the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, *then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs.*" *Duro v. Reina*, 495 U.S. 676, 698 (1990) (emphasis added). Almost immediately after the decision in *Duro*, it became apparent that the "present jurisdictional scheme" was woefully "insufficient" to meet the practical needs of law enforcement in tribal communities.

1. *Duro Created a Jurisdictional Void*

The *Duro* decision created a "jurisdictional void" over misdemeanor offenses committed by non-member Indians. The void was the result of states lacking criminal jurisdiction over Indians on the reservation (except in a few P.L. 280 states) and federal authorities' lack of criminal jurisdiction

over minor crimes committed by Indians against other Indians, 18 U.S.C. § 1152, 1153.

In the five months between the *Duro* decision and the ICRA Amendment, many tribes had to stop prosecuting non-member Indians for these offenses. In many cases, non-member Indians detained or incarcerated by Indian tribes for criminal offenses had to be released. In the hearings before the Senate Select Committee on Indian Affairs and the House Interior and Insular Affairs Committee, the Yakima Indian Nation testified that during the five months the *Duro* decision was in effect, tribal law enforcement had to dismiss pending charges against 43 Indians because they were not enrolled members of the Yakima Indian Nation. *Impact of Supreme Court's Ruling in Duro v. Reina: Hearing Before the Senate Select Comm. on Indian Affairs*, 102nd Cong., Pt. 2, at 79 (1991) (testimony of Harry Smiskin, Tribal Council Member, Yakima Indian Nation) (hereinafter "Yakima Testimony).

The Quinault Indian Nation of Washington testified that its tribal law enforcement office was forced to release 12 non-member Indians awaiting prosecution in tribal court for fairly serious offenses when the *Duro* decision came down, and could not prosecute another 32 misdemeanor offenses committed by non-member Indians in the months following the decision.[14] The Confederated Tribe of the Warm Springs Reservation of Oregon testified that in the months following the *Duro* decision, the tribe was faced with a very serious law enforcement problem including the "many instances of drunk

[14] President DeLaCruz testified that the twelve cases dismissed included statutory rape, assault, breaking and entering, and that, to his knowledge, neither the state nor the federal government prosecuted these cases. The thirty-two cases the tribe was unable to prosecute included attempted kidnapping, weapons violations, criminal trespass and assault. *Impact of Supreme Court's Ruling in Duro v. Reina: Hearing Before the Senate Select Comm. on Indian Affairs*, 102nd Cong., Pt. 2 at 151 (1991) (Testimony of Joseph DeLaCruz, President, the Quinault Indian Nation).

driving, assault, theft, and so on, that simply went unpunished."[15] On at least one reservation, non-members realized the tribe had lost its jurisdiction, and openly mocked tribal law enforcement authorities. As the Suquamish tribe testified, in the five months following the Duro decision, "tribal police were openly taunted, and tribal law flaunted, by non-member Indians."[16]

Congress received a flood of such testimony from tribes from all over the country during the hearings it held on the ICRA Amendment:

> "The Committee was inundated with anecdotal accounts describing serious jurisdictional law and order problems resulting from the Court's holding. Non-member Indian perpetrators on reservations could no longer be taken to the most accessible forums. Remote reservations with high rates of intermarriage were facing chaos."

H.R. Rep. No. 102-61, at 4 (1991).

[15] Vice-Chairman Frank testified that neither state nor federal law enforcement could fill the jurisdictional void. Specifically, he testified that the tribe is exempt from Public Law 280 jurisdiction in the state of Oregon and that the U.S. Attorney informed the tribe that his office does not have the resources to prosecute misdemeanor crimes by non-member Indians. *Impact of Supreme Court's Ruling in Duro v. Reina: Hearing Before the Senate Select Comm. on Indian Affairs*, 102nd Cong., Pt. 2 at 156-57 (1991) (Statement of the Confederated Tribes of the Warm Springs Reservation).

[16] *Status of Jurisdictional Authority in Indian Country, an Assessment of Emerging Issues: Hearing Before the Senate Select Comm. on Indian Affairs*, 102nd Cong., at 39-40 (1991) (Prepared statement of Georgia George, Chairperson, Suquamish Indian Tribe). The Tribe also testified that "six cases had to be dismissed because of Duro, and at least one dozen went unprosecuted." And as the Tribe noted, "[a]lthough these were minor crimes, such as driving while intoxicated and simple battery, all had the potential for serious harm to individuals and the community." *Id.* at 40.

2. *The Vacuum Extended Even to Major Crimes*

Jurisdictional problems arose even for major crimes because, although federal authorities have jurisdiction (18 U.S.C. §1153), they frequently lack the incentive to use it. One anecdotal case involved the rape of a Yakima woman by two Indian men—one a tribal member and one a member of another tribe. Yakima Testimony at 79. Because rape is a major crime, the tribe referred the case to the U.S. Attorney under 18 U.S.C. §1153. However, the tribe testified that as in the "vast majority of tribal referrals," the U.S. Attorneys' Office declined to prosecute either individuals. As a result, the tribe could only prosecute the enrolled Yakima tribal member, while the non-member Indian walked away scot-free. *Id.*

The Tribe further testified: "This example is not an exception to the rule but rather far more resembles the rule. The declination rate when an Indian is the victim of a crime is extremely high." *Id.* In the survey conducted by the National Congress of American Indians following the *Duro* decision, the overall rate of declination was 57% in 1988 and 60% in 1989. In addition, 63% of the responding tribes believed that the U.S. Attorney was not doing a good job of prosecuting major crime referrals. S. Rep. No. 102-168, App. E (1991).

3. *Congress Was Asked By Many Law Enforcement Agencies at all Levels to Take Action*

This crisis in law enforcement raised serious concerns for several Western states with large Indian populations. As Congress noted in Senate Report 102-168, submitted by Senator Inouye of the Senate Select Committee on Indian Affairs:

> "Following the Court's ruling in *Duro*, five western state legislatures–Arizona, South Dakota, Nevada, North Dakota, and Montana—enacted measures calling upon the Congress to permanently reaffirm tribal government jurisdiction over non-member Indian [sic] who commit misdemeanor crimes. A sixth state, New Mexico, was unable to obtain final passage before adjournment but a measure did pass the House unanimously and was favorably reported by the New Mexico Senate Judiciary Committee. Over 70 legislators in Oregon sent a letter to the Chairman of the Senate Select Committee on Indian Affairs urging that Congress enact permanent legislation. A summary of the resolution is contained in Appendix B of this report, along with a summary of a resolution enacted by the International Chiefs of Police on two separate occasions."

S. Rep. No. 102-168, at 4(1991).[17] These resolutions from the state legislatures stated that the *Duro* decision had reversed 200 years of law enforcement precedent, upsetting the delicate balance between tribal, state and federal authorities by creating a substantial jurisdictional void in law enforcement in Indian Country.

Equally alarmed by the burgeoning crisis, the United States Department of Justice also testified in support of the ICRA Amendment. Philip Hogen, U.S. Attorney for South Dakota and Chair of the United States Attorneys' Indian Affairs Subcommittee, testified that the *Duro* decision created a "sudden deprivation of long and widely exercised jurisdiction" that had "caused a serious law enforcement problem in Indian country." S. Rep. No. 102-168, at 21-22 (1991). The Department of Justice fully supported "prompt enactment of [the ICRA Amendment] in order to end the confusion over jurisdiction engendered by Duro." *Id.* at 23.

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[17] The International Association of Chiefs of Police enacted resolutions urging "the U.S. Congress to pass legislation affirming that tribes possess the inherent authority to impose criminal sanctions against all Indians who violate the tribal criminal code within their tribal community." S. Rep. No. 102-168, App. B (1991).

Tribes, state-elected officials, state and federal law enforcement authorities—a chorus of experienced and seasoned voices—all concluded that there was an emergent crisis in law enforcement threatening the safety and well-being of tribal communities throughout Indian country that required Congressional attention. Their testimony was not lost on the Congress. Faced with such overwhelming evidence on the practical effects of this jurisdictional void and the evidence that the tribes had historically exercised this jurisdiction, Congress acted:

> "Confronted with a clear jurisdictional void in law enforcement, and as noted by the dissenting justices in *Duro v. Reina*, because the Congress has never acted to explicitly divest tribal governments of criminal misdemeanor jurisdiction, the Congress responded by enacting an amendment to the Indian Civil Rights Act of 1968 to recognize and reaffirm the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians."

Id. at 4.

B. Congress Reviewed the Historical Record and, Contrary to the Court's Decision in *Duro*, Recognized and Affirmed the Inherent Powers of Indian Tribes

In *Duro v. Reina*, the United States Supreme Court reviewed congressional and administrative provisions and found "at most the tendency of past [federal] Indian policy to treat Indians as an undifferentiated class." 495 U.S. at 690. The Court also found that these "references are not dispositive of a question of tribal power to treat Indians by the same broad classification." *Id.* We respectfully submit that the Court had only a limited view of the historical record of federal Indian policy in this regard and that Congress' view was the more accurate one. After a number of hearings on the issue Congress concluded that the Court's historical

view was inconsistent with 200 years of congressional involvement in the area and the current federal statutory scheme. Furthermore, a re-examination of the Solicitors' Opinions of 1934-1939, which the Court concluded were ambivalent in fact clearly demonstrate that tribes have historically had jurisdiction over all Indians living in their reservation communities.

Congress took issue with the Court's characterization in *Duro* of the history of tribes' exercise of criminal jurisdiction over all Indians, stating that:

> "Until the Supreme Court ruled in the case of Duro, tribal governments had been exercising criminal jurisdiction over all Indian people within their reservation boundaries for well over two hundred years. This exercise of jurisdiction by tribal courts was recognized by the United States and by state governments."

S. Rep. No. 102-168, at 2 (1991). After reviewing the history of its own involvement in this area, Congress recognized that it had never acted to divest tribes of their inherent criminal misdemeanor jurisdiction over all Indians, and had instead taken careful steps to avoid doing so when legislating on the subject. Congress noted that as far back as 1817, when it enacted criminal laws applicable to Indian country in the Indian Country Crimes Act, Act of Mar. 3, 1817, ch. 02, 23 Stat 383, it had disclaimed jurisdiction over crimes "committed by one Indian against another, within any Indian boundary." H.R. Rep. 102-61, at 5 (1991). Congress noted that it had included similar language in the Act of June 30, 1834, ch. 161, 4 Stat. 733, which was subsequently interpreted by the Court in *United States v. Rogers* to apply to Indians as a class, not as members of a tribe. *Id.* Congress also pointed out that the federal jurisdictional exclusion for crimes committed by one Indian against another Indian in the 1834 Act was upheld in this Court's holding in *Ex Parte*

Crow Dog, 109 U.S. 556 (1883), and led to the passage of the Major Crimes Act, 18 U.S.C. § 1153 . *Id.*

Examining the current federal statutory scheme, 18 U.S.C. § 1152 (which specifically exempts Indian on Indian crime from federal jurisdiction) and §1153 (which establishes federal jurisdiction for only major Indian on Indian crimes), Congress concluded that:

> "Congress has never changed its position as to the authority of Indian tribal governments to exercise criminal misdemeanor jurisdiction over non-member Indians and is now reaffirming this inherent authority."

Conf. Rep. No. 102-261, at 4-5 (1991). After considering the history of its own actions in this area, the current federal statutory scheme, and the testimony it heard from tribal leaders and legal scholars over the course of the lengthy hearings it held on the subject, Congress concluded that:

> "[f]rom the perspective of most Indian legal scholars and virtually all tribal leaders, the prevailing view is that if Congress had intended to divest Indian tribal governments of jurisdiction over non-member Indians, it would have explicitly done so. Instead, the assumption in Congress has always been that tribal governments do have such jurisdiction. Federal statutes reflect this view, as Congress has never differentiated between member Indians and non-member Indians."

S. Rep. No. 102-153, at 3 (1991).[18]

C. Subsequent Analysis of the Historical Record, Particularly of the Solicitor's Opinions Relied on by the Court in *Duro*, Comports With Congress' Conclusion

The *Duro* Court references five Solicitor opinions which it deemed the "most specific historical evidence on the question" of whether inherent tribal criminal jurisdiction extends

[18] On this point, the record adopts wholesale the characterization of the dissent in *Duro* as proper. *See* Conf. Rep. No. 102-261, at 3-4 (1991).

to Indians who are not members of the tribe. 495 U.S. at 692. However, with all respect, this "specific historical evidence" seems to support what Congress understood—that tribes had not in any way been divested by Congress of their criminal jurisdiction over all Indians on their reservations.[19]

Four months after the passage of the IRA by Congress, Solicitor Margold issued, and Assistant Secretary Oscar L. Chapman approved, the Department of the Interior's seminal legal opinion entitled the *Powers of Indian Tribes*, 1 Op. Sol. 445 (Oct. 25, 1934) (hereinafter the "1934 Solicitor Opinion").[20] In *Duro*, the Court characterized the 1934 Solicitor Opinion as only speaking "in broad terms of jurisdiction over Indians generally." 495 U.S. at 691. Actually, this remarkable 89-page legal opinion lays the foundational principles underlying present-day federal Indian law and policy, including the inherent power of Indian tribes to exercise criminal jurisdiction over all Indians on their reservations.

Equally important, the 1934 Solicitor Opinion is based on an exhaustive review of the historical record—existing statutes, reported case law and written opinions of executive agencies—and constitutes a formal definitive statement of the Department of the Interior's official legal position in relation to the inherent powers of Indian tribes. The 1934 Solicitor Opinion first states the general rule:

> "It is illuminating to deal with the question of tribal jurisdiction as we have dealt with other questions of tribal authority, by asking, first, what the original

[19] *See* Elizabeth A. Harvey, *The Aftermath of Duro v. Reina: A Congressional Attempt to Reaffirm Tribal Sovereignty Through Criminal Jurisdiction over Nonmember Indians*, 8 T.M. COOLEY L. REV. 573 (1991); William R. Quinn, *Intertribal Integration: The Ethnological Argument in Duro v. Reina*, ETHNOHISTORY 40:I, Winter 1993 at 34-69.

[20] 55 I.D. 14, 1 Opinions of the Solicitor Department of the Interior Relating to Indian Affairs 1917-1974 (Op.Sol.) pp. 445-477 (Oct. 25, 1934). This citation is a reprint of the original opinion which is 89 pages in length and is referenced as M-27781.

sovereign powers of the tribes were, and then, how far and in what respects these powers have been limited.

> "So long as the complete and independent sovereignty of an Indian tribe was recognized, its criminal jurisdiction, no less than its civil jurisdiction, was that of any sovereign power. It might punish its subjects for offenses against each other or against aliens and for public offenses against the peace and dignity of the tribe. *Similarly, it might punish aliens within its jurisdiction according to its own laws and customs. Such jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government.*"[21]

1 Op.Sol. At 471-472 (emphasis added).

The Solicitor then examines how federal jurisdiction coincided with tribal jurisdiction. The Opinion looked first to the basic provision of federal law which extended the general laws of the United States regarding the punishment of crimes committed in Indian country—the Indian Country Crimes Act. The Opinion notes that the Act contains the following important exception for:

> ". . . crimes committed by one Indian against the person or property of another Indian, [or] any Indian . . . committing any offense in the Indian country who has been punished by the local law of the tribe . . . ."

Id. at 472. In analyzing the scope of the inherent power of Indian tribes to exercise criminal jurisdiction over all Indians on their reservations in relation to the Indian Country Crimes Act, the Solicitor unequivocally states: "These provisions recognize that, with respect to crimes committed by one Indian against the person or property of another Indian, *the jurisdiction of the Indian tribe is plenary.*" *Id.* (emphasis added).

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[21] A conclusion that was echoed in the Secretary's regulations for the Courts of Indian Offenses, *see* supra n.13.

In examining the circumstances following the passage of the Major Crimes Act and the continuing limitations of federal criminal jurisdiction in Indian country, the Solicitor found:

> "The difficulties of this situation have prompted agitation for the extension of Federal or State laws over the Indian country, which has continued for at least five decades, without success. The propriety of the object sought is not here in question, but the agitation itself is evidence of the large area of human conduct which must be left in anarchy if it be held that tribal authority to deal with such conduct has disappeared.
>
> "Fortunately, such tribal authority has been repeatedly recognized by the courts, and although it has not been actually exercised always and in all tribes, it remains a proper legal basis for the tribal administration of justice wherever an Indian tribe desires to make use of its legal powers."

Id. at 474. Clearly, the 1934 Solicitor Opinion is much more that an opinion which speaks only "in broad terms of jurisdiction over Indians generally." To the contrary, the 1934 Solicitor Opinion provides the specific historical background and the specific legal framework for understanding the inherent powers of Indian tribes, which the Solicitor found included the inherent power of Indian tribes to exercise criminal jurisdiction over Indians enrolled on other reservations.

The remaining four Solicitor opinions relied upon by the *Duro* Court are short, fact-specific opinions concerning the exercise of criminal authority by a particular tribe or group of tribes and lend little support to a conclusion that Indian tribes lack criminal jurisdiction over non-member Indians, a conclusion that would be contrary to the 1934 Solicitor Opinion, and also to the jurisdiction spelled out in the Code of Federal Regulations for the Interior Department-created Court of Indian Offenses. *See supra* n.13.

First, there is the 2-page 1936 Solicitor opinion which, in the words of the Court: "flatly declares that '[i]nherent rights of self government may be invoked to justify punishment of members of the tribe but not of nonmembers.'" 495 U.S. at 691, citing 1 Op. Sol. 699 (Nov. 17, 1936). However, the trespassers in that case were *non-Indians*. The Solicitor stated, "There is no question but that ordinances providing for the removal of *non-Indian* trespassers and for the seizure of game unlawfully taken from Indian lands should be approved . . . . On the other hand, ordinances providing for the confiscation of firearms involve delicate questions of law and administration." 1 Op.Sol. at 700 (emphasis added). There was no reason for him to have non-member *Indians* in mind when he used the term "non members." In those days, "non-member" could easily have been used interchangeably with "non-Indians" when the context did not require precision.

The 2-page 1937 Solicitor's Opinion concerned a tribal ordinance under the law and order codes of the Confederated Salish and Kootenai Tribes, which defined the term "Indian" to be "any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction." 1 Op. Sol. 736 (Mar. 17, 1937). The ordinance was not approved by the Secretary, but only because it did not comport with the tribal constitution. The Solicitor found that the Tribes' constitution only authorized the Tribal Council to enact ordinances governing the conduct of *members* of the Confederated Tribes. As Justice Kennedy said in *Duro*, 495 U.S. at 691, this indicates that the Tribe would have had the jurisdiction merely by amending the constitution.

The final two Solicitor opinions are likewise not on point. The one-page 1938 Solicitor opinion, 1 Op.Sol. 849 (Aug. 26, 1938), addressed the question of tribal court jurisdiction over persons who are "non-ward Indians" on the Rocky Boy's Reservation, while the 1939 Solicitor opinion addressed the question of tribal criminal jurisdiction over "unaffiliated Indians" on the Rocky Boy's and Blackfeet Indian Reservations. 1 Op.Sol. 872 (Feb. 17, 1939).[22]

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be reversed.

Respectfully submitted

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November 14, 2003

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[22] *See also* 1 Op. Sol. 859 (October 25, 1938). This Solicitor opinion is not mentioned by the Court and is titled *Applicability of Law and Order Codes to Non-Member Indians on Blackfeet and Rocky Boy's Reservation.* This Solicitor opinion flatly declares that "Indians who are members of other recognized tribes are not subject to the [state] laws, at least with respect to activities on the [Reservation] which do not affect non-Indians." Once again, the tribal law and order codes at issue were limited by the tribal constitution which restricted enforcement of ordinances against members of the tribe only. This Solicitor opinion expressly recognized the gap created in law enforcement as the result.

(9)

No. 03-107

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In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

BILLY JO LARA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF THOMAS LEE MORRIS, ELIZABETH S. MORRIS AND ROLAND J. MORRIS, SUPPORTING RESPONDENT

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICI*	1
STATEMENT	7
SUMMARY OF ARGUMENT	12
ARGUMENT	13
ALTHOUGH IT DOES NOT APPEAR RESOLVING THE SERIOUS CONSTITUTIONAL ISSUES PRESENTED BY THE ICRA AMENDMENTS IS NECESSARY TO DECIDE THIS CASE, CONGRESS PLAINLY EMPLOYED A RACIAL CLASSIFICATION WHEN ENACTING THEM AND THEY DO NOT WITHSTAND STRICT SCRUTINY; MOREOVER, THE DUE PROCESS DEPRIVATION THAT OCCURS WHEN U.S. CITIZENS ARE SUBJECTED TO NON-CONSTITUTIONAL CRIMINAL PROSECUTION AND PUNISHMENT, MERELY TO ADDRESS MISDEMEANOR CRIMES, CANNOT BE JUSTIFIED	13
I. It Is Unclear Whether Equal Protection and Due Process Issues must Be Resolved Here...	13
II. The ICRA Amendments Violate Equal Protection	17
III. The ICRA Amendments Violate the Fundamental Fifth Amendment Right to Due Process Because They Subject U.S. Citizens to Trial and Punishment, Including Possibly Incarceration, by Sovereign Governments Within the Territory and Subject to the Power of the United States but Not Required to Comply with Constitutional Guarantees....	23
CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES:

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).....21, 22

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).....21, 22

Confederated Tribes of the Colville Reservation v. Washington, 938 F.2d 146 (1991)..... 2

Duro v. Reina, 495 U.S. 676 (1990) .....*passim*

Ex parte Pero, 99 F.2d 28 (7th Cir. 1938).....19

Fullilove v. Klutznick, 448 U.S. 449 (1980) 21

Hirabayashi v. United States, 320 U.S. 81 (1943).....21

Hunt v. Cromartie, 526 U.S. 541 (1999) 21

Korematsu v. United States, 323 U.S. 214 (1944) 21

Middlemist, et al. v. Pablo, et al., 23 ILR 6141 (1996)..... 1

Miller v. Johnson, 515 U.S. 900 (1995).....21

Morris v. Tanner, 03-35279..... 3

Morris v. Tanner, ___ F. Supp. 2d ___, 2003 WL 22439854 (D. Mont.)..... 3

Morris v. Tanner, CV-99-82-M-DWM 2

Morris v. Tanner, Unpublished Order, filed October 5, 1999 2

Morris v. Tanner, Unpublished Memorandum Opinion, dated July 24, 2001 4

TABLE OF AUTHORITIES – Continued

Page

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).....7, 9

Reid v. Covert, 354 U.S. 1 (1957) 23, 24

Rice v. Cayetano, 528 U.S. 495 (2000) 21, 22

Saenz v. Roe, 526 U.S. 489 (1999).....4, 6

Shaw v. Reno, 509 U.S. 630 (1993).....21, 22

Talton v. Mayes, 163 U.S. 376 (1896) 8

United States v. Broncheau, 597 F.2d 1260 (9th Cir. 1979).....19

United States v. Dodge, 538 F.2d 770 (8th Cir. 1976).....19

United States v. Enas, 255 F.3d 662 (2001), *cert. den'd*, 534 U.S. 1115 (2002)..... 2

United States v. Ives, 504 F. 2d 935 (9th Cir. 1974) 19

United States v. Mazurie, 419 U.S. 544 (1975).....23

United States v. Rogers, 45 U.S. (How.) 567 (1846).....10, 15, 19

Woirhaye v. Montana Fourth Judicial District Court, 292 Mont. 185, 972 P.2d 800 (1998)..... 4

Wygant v. Jackson Bd of Educ., 476 U.S. 267 (1986).....17

CONSTITUTION, TREATISES, STATUTES AND REGULATION:

U.S. Const.:

Fifth Amendment.....13, 14, 25

Indian Commerce Clause, Art. I, §8, cl. 3.....16

Property Clause, Art. IV, §3, cl. 2 5

Treaty Clause, Art. II, §2, cl. 2..... 5

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. §1153 ..... 10, 18, 19

1855 Treaty of Hellgate, Flathead Tribes and the United States, 12 Stat. 975 5

1991 Defense Appropriations Act, Pub. L. No. 101-511, §8077(b)-(d), 104 Stat. 1856, 1892-93 (1990) 9

Flathead Allotment Act of April 23, 1904, 33 Stat. 302 5

Indian Civil Rights Act of 1968, 25 U.S.C. §1301 *et seq.* ..... *passim*

Indian Civil Rights Act, Pub. L. No. 101-511, §8077 (1990), amending 25 U.S. C. §1301 2

Indian Civil Rights Act, Pub. L. No. 102-137, 105 Stat. 646 (1991) ..... *passim*

MISCELLANEOUS:

1999 Indian Labor Force Report, U.S. Department of Interior, Bureau of Indian Affairs Office of Tribal Services 10-11

Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, as Amended, Title I, Ch. 1, Part 1 5

Felix S. Cohen, *Handbook of Federal Indian Law* (1971 ed.) 8

Law and Order Code of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Chapter IV, Code of Tribal Offenses, Section H, Offenses Against Public Order, Health, and Decency, subsection H12, Traffic Offenses 1

TABLE OF AUTHORITIES – Continued

Page

Population Registration Act No. 30 of 1950, Statutes of the Republic of South Africa 71 (1985) 20

The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution, L. Scott Gould, Vol. 28, No. 1, U.C. Davis L. Rev. 53 18

The Holocaust: Legalizing the Holocaust, The Early Phase, 1933-1939 (John Mendelsohn & David S. Detwiler eds., 1982) 20

U.S. Code Congressional and Administrative News, Vol. 2, 102d Congress, 1st Session, 1991 10

U.S. Department of Commerce, Economics & Statistics Administration, U.S. Census Bureau, March 2001, Overview of Race & Hispanic Origin 11

INTEREST OF *AMICI*

Pursuant to Supreme Court Rule 37.2 *amici curiae* file this brief in support of Respondent.[1]

Thomas Lee Morris, now 20 years old, is an American Indian and is enrolled as a member of the Minnesota Chippewa Tribe, Leech Lake Reservation, Minnesota. He is not a member of the Confederated Salish & Kootenai Tribes, who are *amici* here, headquartered in Pablo, Montana, within the Flathead reservation. When he was 17 years old, he was cited with allegedly committing a crime under the Flathead Tribes' laws, and the Tribes have asserted jurisdiction to prosecute and punish him. Law and Order Code of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Chapter IV, Code of Tribal Offenses, Section H, Offenses Against Public Order, Health, and Decency, subsection H12, Traffic Offenses, at 45-46.[2]

---

[1] Letters of consent to the filing of this Brief from counsel for the parties have been filed with the Clerk. No counsel for a party authored this brief in whole or in part. No person or entity, other than counsel for *Amici*, made a monetary contribution to the preparation and submission of this brief.

[2] The crime for which Thomas Morris has been charged in Flathead Tribal Court is speeding. While this particular accusation is not itself momentous, determining whether Congress can select nonmember Indians, and only Indians, for criminal prosecution in the courts of sovereigns which exclude them from full and equal rights of political participation on the ground of their ethnicity and which sovereigns and courts are unbounded by the Constitution is momentous indeed. Indeed, in a civil context, the Flathead Tribes' own Appellate Court recognized this, stating "[t]he exercise of tribal jurisdiction over non-Indians is replete with constitutional issues." *Middlemist, et al. v. Pablo, et al.*, 23 ILR 6141, 6143 n.5 (1996). If it is worth judicial

(Continued on following page)

Defending against this prosecution, he and his parents, Lisa and Roland Morris ("Morrises"), exhausted tribal remedies, then sought injunctive relief and a declaration of unconstitutionality of the 1990 amendments to §1301 of the Indian Civil Rights Act, Pub. L. No. 101-511, §8077 (1990), amending 25 U.S.C. §1301,[3] the sole source of the Tribes' authority to prosecute him, in a complaint filed in the United States District Court for the District of Montana. *Morris v. Tanner*, CV-99-82-M-DWM. Morrises challenged the ICRA amendments on grounds that they violate both the due process and equal protection components of the Fifth Amendment as well as the basic principle of separation of powers. The District Court dismissed the complaint without ruling on these issues, simply noting that Congress had enacted the 1990 amendments. (Unpublished Order, filed October 5, 1999.)

On appeal, the Ninth Circuit Court of Appeals, noting similarities between Morrises' case and *United States v. Enas*, 255 F.3d 662 (2001), *cert. den'd*, 534 U.S. 1115 (2002), invited the United States to submit an amicus curiae brief and present oral argument. The United States

resources to protect tribal sovereignty over civil traffic offenses within a reservation, *Confederated Tribes of the Colville Reservation v. Washington*, 938 F.2d 146, 148 (1991), Morrises submit the protection of individual rights from congressional acts based explicitly on racial grounds and consigning U.S. citizens to prosecution and punishment by non-constitutional tribunals is at least as important. *Duro v. Reina*, 495 U.S. 676 (1990)

[3] The 1990 ICRA amendments, at issue here, contained a sunset provision and lapsed after one year. After the passage of a few days, Congress re-enacted them permanently, Pub. L. No. 102-137, 105 Stat. 646 (1991). Hereinafter, they are referred to as the "ICRA amendments."

did so, arguing as it has here that the ICRA amendments represent only a political classification by Congress and therefore strict scrutiny analysis is not required because, it was claimed, only people – not necessarily Indians – who are enrolled members of a federally-recognized tribe were made subject to tribal criminal jurisdiction by the amendments.[4]

The Ninth Circuit, in an unpublished memorandum opinion, reversed and remanded to the District Court with instructions to decide the constitutional issues presented. Unpublished Memorandum Opinion, dated July 24, 2001. App. 4-11. Specifically, the Ninth Circuit directed the District Court to determine whether Congress made a racial classification in enacting the ICRA amendments in which it consigned only nonmember Indians to tribal criminal jurisdiction or a political classification. *Id.* at 10.

On remand, the United States intervened as a party defendant. The District Court again upheld the 1990 amendments, holding that Congress made only a political classification, requiring only a rational basis. *Morris v. Tanner*, ___ F. Supp. 2d ___, 2003 WL 22439854 (D. Mont.) decided October 28, 2003. This matter is now back on appeal to the Ninth Circuit. *Morris v. Tanner*, 03-35279.

[4] In its written submission to the Ninth Circuit and at oral argument one of the U.S. attorneys here, Mr. Richard A. Friedman, told the Ninth Circuit panel that the "fact" that non-Indians can and have been recognized as tribal members under tribal and federal rules proves this is merely a "political" classification. Because this claimed "fact" is neither factually nor legally correct, the United States later retracted this assertion in a letter to the court. App. 1.

The Morris family is representative of many American families whose members, or some of them, are Indian.[5]

[5] Roland Morris, Thomas' father, is also a member of the Minnesota Chippewa Tribe, Leech Lake Reservation, as are his four brothers and sisters, ranging in age from 16 to 10 years old. Elizabeth Morris, his mother, is not Indian, and is, consequently, ineligible for membership in any tribe. This means that for the very same offense Thomas allegedly committed, his mother would be tried in a state court, where, under Montana law she would have the right to a jury trial, and the jury would have to be seated in conformity with state and federal constitutional requirements. *Woirhaye v. Montana Fourth Judicial District Court*, 292 Mont. 185, 191, 972 P.2d 800, 803 (1998). In Thomas' case, by contrast, simply because he is an Indian, he does not have a right to a jury trial, the trial judge in his case, by tribal statute, must be a tribal member, (App. 13), and even if tribal law did allow a jury, only tribal members could be seated. *Id.* Moreover, again simply because of his race, Congress in the 1990 amendments subjected him to the court of a sovereign in which, because of his ethnicity – i.e., while he is Indian, he does not have sufficient "blood quantum" (see App. 12) to be a Flathead Indian – he cannot fully participate in the tribal political process which develops the law he purportedly must comply with. Thus, because he is ineligible for membership in the Flathead Tribes, he cannot hold tribal office or vote in tribal elections. Consequently, he has no right to participate in the political process by which the very Law and Order Code under which he is being prosecuted was developed and adopted.

This is not analogous to the situation of a non-resident of one state or local jurisdiction being subject to criminal prosecution in another. Most importantly, in every place in the United States other than those subject to the criminal jurisdiction of Indian Tribes, police, prosecutors and courts are bound by the minimum standards set by the Constitution. Thus, a North Dakota resident prosecuted in a Montana court has all the protections afforded him under the Constitution. Moreover, residency is the key factor in determining the right to participate fully and equally in the political process of the state and this, too, is limited by constitutional guarantees. *Saenz v. Roe*, 526 U.S. 489, 499-502 (1999). One's race, obviously, is a forbidden basis for allowing or prohibiting political participation. In the case of the 1990 amendments, nonmembers are excluded from full and equal rights of participating in the political process of the tribal sovereign precisely because of their race – in the case of non-Indians – or ethnicity – in the case of Indians

(Continued on following page)

Thomas Morris lives with his family in Ronan, Montana, within the Flathead reservation. The Morris family has lived there for more than 15 years, Mr. Morris running an upholstery business and Mrs. Morris working at a variety of jobs, including caring for five children and four minor grandchildren (who are also Indians but not Flathead Indians).

As noted, the Indian members of the Morris family are not members of the Flathead Tribes, nor are they eligible for membership because they lack the Flathead Indian "blood quantum" required. See Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, as Amended, Title I, Ch. 1, Part 1, requiring one-quarter "Salish or Kootenai blood" to be a tribal member (Section 2), and defining "Indian Blood," unless the context requires otherwise, as meaning "the blood of either or both the Kootenai or the Salish Tribes of the Flathead Reservation." App. 12. Consequently, they do not have the right to participate fully and equally in the political life of the Flathead Tribes. They simply live within the reservation just as the non-Indian population of about 18,000 lives there. (Congress opened the Flathead reservation, which it set aside using its Treaty Clause, Art. II, §2, cl. 2, and Property Clause, Art. IV, §3, cl. 2, powers in 1859 when it ratified the 1855 Treaty of Hellgate between the Flathead Tribes and the United States, 12 Stat. 975, to nonmember settlement in 1904 when it enacted the Flathead Allotment Act. Act of April 23, 1904, 33 Stat. 302.) The non-Indian population residing on the reservation, however, is

who are not eligible, because of the lack of the appropriate "blood quantum," for tribal membership.

free of the threat of tribal criminal prosecution, because of their race – i.e., they are not Indians. Only Indians who are on the reservation, because they live there, are visiting there, or are merely passing through, have that potential burden.[6] Also, like many American families, the Morrises travel. In the last three years, in their travels they have passed through the Blackfeet reservation in Northern Montana on their way to Canada; and through the Crow reservation in South Central Montana, the Wind River reservation in Wyoming and the Isleta reservation in New Mexico on a trip to Mexico.

Unlike any non-Indian travelers, while passing through these reservations the Morrises, with the

[6] Congress' enactment of the ICRA amendments created a unique situation perhaps implicating the fundamental right to travel. See *Saenz v. Roe*, 526 U.S. 489 (1999). For example, a Seminole Indian residing in Florida may well decide to visit Glacier National Park in northwest Montana. Unless he or she chooses the route very carefully, and chooses to take a circuitous route, that person will likely travel, by U.S. highway, either through the Blackfeet reservation or the Flathead reservation to get there. For the hour or so it takes to drive through one of these reservations, that person, if accused of a misdemeanor crime, would have to vindicate himself or herself in the tribal court, subject to all the local tribe's particular procedures, customs and laws. Since under the ICRA amendments the tribe would be exercising its inherent sovereign authority, this person would not have the protection of the Constitution. The only reason for this would be that person's race. If his or her spouse was accused of the same crime but, as in the Morrises' case, was not Indian, the spouse would be tried in a different court in which all constitutional rights were protected. The only distinction causing this would be the race of each individual. Aside from this explicit racial issue and the equal protection problem it raises, it is difficult to see how such a U.S. citizen's right to travel would not be abridged if whenever he or she entered an Indian reservation Congress subjected them to the power of a non-constitutional sovereign.

exception of Lisa Morris, would be subject to the local tribe's criminal jurisdiction under the ICRA amendments.

STATEMENT

1. In *Duro v. Reina*, 495 U.S. 676 (1990), the Court applied the analysis and holding it had reached previously in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) to nonmember Indians. Since there is no principled difference between the situation of nonmember non-Indians and nonmember Indians when confronted with the power of a tribal government, the Court found tribes lack the inherent sovereign power to prosecute them for misdemeanor crimes they allegedly committed on a reservation. Substituting governmental-ease and expediency for the interests of individuals, the U.S. and various tribes had argued against such a holding on the ground that it would create a "jurisdictional gap." The Court declined to subject U.S. citizens to a non-constitutional sovereign that excludes them from its political processes because of their race or ethnicity for this reason. "The exercise of criminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe, and involves a far more direct intrusion on personal liberties." *Duro v. Reina*, 495 U.S. 676, 110 S.Ct. 2053, 2061 (1990). The Court further noted:

> "Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States. We hesitate to adopt a view of tribal sovereignty that would single out another group of citizens,

nonmember Indians, for trial by political bodies that do not include them. As full citizens, Indians share in the territorial and political sovereignty of the United States. The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members. Indians like all other citizens share allegiance to the overriding sovereign, the United States. A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority.

The special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate. While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often "subordinate to the political branches of tribal governments," and their legal methods may depend on "unspoken practices and norms." Cohen 334-335. It is significant that the Bill of Rights does not apply to Indian tribal governments. *Talton v. Mayes*, 163 U.S. 376, 16 S.Ct. 986, 41 L.Ed. 196 (1896). The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts."

Duro v. Reina, 495 U.S. 676, 110 S.Ct. 2053, 2064 (1990).

Consequently, in *Duro*, the Court held:

"[i]n the area of criminal enforcement . . . tribal power does not extend beyond internal relations among members. Petitioner is not a member of

the Pima-Maricopa Tribe and is not now eligible to become one. Neither he nor other members of his Tribe may vote, hold office, or serve on a jury under Pima-Maricopa authority. Cf. *Oliphant*, 435 U.S., at 194, and n. 4, 98 S.Ct., at 1013, and n. 4. For purposes of criminal jurisdiction, petitioner's relations with this Tribe are the same as the non-Indian's in *Oliphant*. We hold that the Tribe's powers over him are subject to the same limitations." *Duro v. Reina*, 495 U.S. 676, 110 S.Ct. 2053, 2061 (1990).

To be sure, the Court noted the possibility that a "jurisdictional gap" could result from its decision, and it noted that Congress has the authority to address any such problem. The Court did not say and surely did not imply, as Petitioner and its tribal *amici* seem to assume, that in fashioning a remedy Congress could act without regard to constitutional constraints, specifically equal protection and due process guarantees.

2. Certain members of Congress rushed into the breach to "fix" *Duro*, but it cannot be said the ICRA amendments endured congressional scrutiny prior to enactment. Instead, they were attached as a rider to the 1991 Defense Appropriations Act, Pub. L. No. 101-511, §8077(b)-(d), 104 Stat. 1856, 1892-93 (1990), with the promise of "comprehensive legislation" to follow. Ex post facto hearings took place the following summer at which not a single witness spoke for individual nonmember Indians. Moreover, no "comprehensive legislation" was considered much less enacted. Instead, the emergency language enacted as a stop-gap in 1990 was simply made permanent. Pub. L. No. 102-137, 105 Stat. 646 (1991).

The House Report acknowledged that the statute on which the amendments rely to define "Indian," 18 U.S.C. §1153, "made no distinction regarding the tribal membership of the Indian. The status of non-member Indians . . . was clarified in *United States v. Rogers*, 45 U.S. (How.) 567 (1846) where the Supreme Court held that the statute applied to Indians as a class, not as members of a tribe, but as part of the family of Indians. 45 U.S. 573." The legislative history also notes: "Courts have repeatedly held that the term 'Indian' includes any Indian in Indian Country, without regard to tribal membership. (Citations omitted) [T]he Committee intends to clarify precisely that the inherent powers of Indian tribes includes the authority to exercise criminal misdemeanor jurisdiction over all Indians in Indian country." U.S. Code Congressional and Administrative News, Vol. 2, 102d Congress, 1st Session, 1991 at 375. Senator Tom Daschle, D-S.D., appended a separate statement to the Conference Committee's Report indicating serious concern for the very constitutional issues raised here but agreeing to the report because of the "urgency of this situation." U.S. Code Cong. Admin. News, Vol. 2, 102d Cong., 1st Sess. (1991) at 382-83. The only reason provided by Congress for filing this purported "gap" in jurisdiction in the manner it did was that crimes allegedly committed by nonmember Indians on reservations "are the most tedious crimes with which law enforcement officers deal." *Id.* at 373.

3. According to a 1999 Report by the Department of Interior, there are 556 federally recognized Indian tribes in the United States, with reservations in Maine, Connecticut, New York, Florida, California, Arizona, Alaska, and all points in between. 1999 Indian Labor Force Report, U.S. Department of Interior, Bureau of Indian Affairs Office of Tribal Services.

4. According to the 2000 Census, there are 4,119,301 Indians in the United States, of which, according to the Department of Interior, 1,698,483 are enrolled in a tribe. Notably, the U.S. Census Bureau's definition of an "American Indian" states that it refers to people who have native origins and "who maintain tribal affiliation or community attachment." U.S. Department of Commerce, Economics & Statistics Administration, U.S. Census Bureau, March 2001, Overview of Race & Hispanic Origin. Under Petitioner's argument, this means 1.7 million U.S. citizens are subject to criminal prosecution in tribal courts of which they are not members first and foremost because of their race. But, as demonstrated below, Petitioner's analysis as to who is an "Indian" for purposes of the ICRA amendments lacks merit. Under controlling federal law, one can be an Indian and not be a tribal member. Race is the key, immutable factor. Thus, in fact, the ICRA amendments consigned in excess of 4 million U.S. citizens, because of their race, to non-constitutional prosecution and punishment.[7]

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[7] Counsel for Petitioner and its *amici* supporters uniformly express sanguine regard for the punishment tribal courts mete out for misdemeanor crimes, noting that the punishment is "limited" to "only" one year in jail and a $5,000 fine. This indicates they have not experienced or even faced the realistic prospect of paying thousands of dollars in fines and/or spending a year or indeed a month in jail, any jail. Moreover, it indicates they do not realize or have chosen to ignore the reality that tribal courts, like other courts, can and do "stack" multiple punishments when there are multiple misdemeanors, potentially resulting in fines and jail time in excess of these "minimal" amounts.

SUMMARY OF ARGUMENT

When it enacted the ICRA amendments at issue here, Congress attempted and intended only to "recognize[ ] and affirm[ ]" pre-constitutional inherent sovereign power in Indian tribes that this Court had ruled they do not possess. While this plainly raises constitutional issues, not least of which concern due process and equal protection guarantees, this particular case, because of its procedural posture, may not squarely present such issues. Because the federal court's jurisdiction over this prosecution rests on grounds independent of the ICRA amendments, finding the ICRA amendments either constitutional or unconstitutional in this case may not affect the precise issue presented: whether the Double Jeopardy clause prevents the federal prosecution from going forward or not.

If the Court addresses the troubling equal protection and due process issues presented by the ICRA amendments, Morrises argue they must be found to violate both fundamental guarantees. The amendments on their face rely on a racial classification. The fact that every person swept into tribal criminal jurisdiction is, by his or her race, an Indian, demonstrates that this is a racial, not a "political" classification. No compelling federal interest justifies this, and the amendments are not narrowly tailored. Viable alternatives that do not require a racial classification exist. Congress could either expressly empower states to prosecute misdemeanor crimes allegedly committed by all nonmembers or require federal authorities to do so. While these remedies may be unpalatable to the politically powerful forces that pushed for the ICRA amendments, they demonstrate that Congress was not required to employ this racial classification. Moreover, the

amendments purport to consign U.S. citizens – nonmember Indians – to prosecution and punishment by tribunals of sovereigns which are not bound by the Constitution and which exclude them, because of their ethnicity, from full and equal rights of participation in the political life of the prosecuting tribe. The goal of prosecuting misdemeanor crimes cannot justify the deprivation of rights, within the territorial confines of the United States, that results from subjecting certain citizens, solely because of their race, to non-constitutional criminal tribunals.

ARGUMENT

ALTHOUGH IT DOES NOT APPEAR RESOLVING THE SERIOUS CONSTITUTIONAL ISSUES PRESENTED BY THE ICRA AMENDMENTS IS NECESSARY TO DECIDE THIS CASE, CONGRESS PLAINLY EMPLOYED A RACIAL CLASSIFICATION WHEN ENACTING THEM AND THEY DO NOT WITHSTAND STRICT SCRUTINY; MOREOVER, THE DUE PROCESS DEPRIVATION THAT OCCURS WHEN U.S. CITIZENS ARE SUBJECTED TO NON-CONSTITUTIONAL CRIMINAL PROSECUTION AND PUNISHMENT, MERELY TO ADDRESS MISDEMEANOR CRIMES, CANNOT BE JUSTIFIED.

I. It Is Unclear Whether Equal Protection and Due Process Issues must Be Resolved Here.

A. Without clearly stating so, Petitioner appears to have drafted the Question Presented to encompass whether the acts of Congress at issue here are proof from any constitutional challenge, whether the issue is Double Jeopardy, which is directly presented here, or Fifth Amendment equal protection and due process which are

not clearly raised. The views of Petitioner and *amici* in support of its position, in whole or in part, diverge on this point.

Petitioner, again though not directly raising and addressing the issue of whether this case is appropriate for the Court to analyze the ICRA amendments for compliance with the Fifth Amendment equal protection and due process guarantees, argues that the amendments do not violate equal protection or due process guarantees because, it claims, the explicit racial classification Congress engaged in is, notwithstanding all appearances, "political," and therefore only a rational basis analysis is required. Petitioner's Brief, pp. 34-39.

B. The six *amici* states supporting Petitioner[8] in part, assert that resolution of this case does not require deciding whether the ICRA amendments violate equal protection or due process guarantees. Idaho *Amicus* Brief at pp. 12-17. These *amici* however, persuasively, argue that, should the Court analyze the amendments on those grounds, they should be found unconstitutional. *Id.* at pp. 1-2, 11, 18-28. Idaho, as usual, presents an elegant analysis that would dispose of this case in a simple manner. Noting that since neither the plain words of the ICRA amendments nor the legislative history indicate that Congress intended to delegate federal authority to tribes, as the Court of Appeals held, Idaho argues the Court may halt its analysis at that point because, consequently,

[8] These states are Idaho, Alabama, Louisiana, Nebraska, South Dakota, and Utah. For the sake of clarity, they are referred to hereinafter as "Idaho."

Respondent Lara cannot possibly have a viable double jeopardy claim under established doctrines. *Id.* at pp. 10-11, 12-17. If Idaho is correct, and in light of the specific procedural posture of this case – i.e., a double jeopardy challenge originating in federal court to a federal prosecution following a tribal prosecution – it is difficult to understand how this case can present equal protection and due process challenges to the ICRA amendments. While a ruling on such grounds could invalidate or uphold a tribal prosecution under the ICRA amendments, neither invalidating nor upholding the ICRA amendments on those grounds would have any impact on this subsequent federal prosecution.

C. Notwithstanding that, Petitioner framed the Question Presented in a broad manner – generally asking whether Section 1301, as Congress amended it, "validly restores" the pre-constitutional, inherent sovereign authority this Court held in *Duro v. Reina*, 495 U.S. 676 (1990), tribes no longer possess to prosecute nonmembers who are Indians[9] for misdemeanors they are alleged to have committed on the prosecuting tribe's reservation. In contrast to its ambiguous Question Presented, Petitioner plainly argues the ICRA amendments do not violate equal protection or due process guarantees. Petitioner's Brief at

[9] Morrises respectfully note that Petitioner's statement of the Question Presented does not reflect what Congress actually did when enacting the ICRA amendments. In the ICRA amendments, Congress explicitly subjected "Indians," not "members of other Tribes," as Petitioner puts it, to tribal criminal jurisdiction. Moreover, in defining "Indians" Congress explicitly referred to a statutory definition of "Indians" which this Court has ruled does not refer only to tribal members. *United States v. Rogers*, 45 U.S. (How.) 567 (1846).

pp. 12-13, 34-43. At least as to equal protection, Petitioner's argument hinges on this Court's acceptance of its characterization of the ICRA amendments as an act in which Congress employed a political classification, rather than the racial classification on the face of the text of the amendments.

D. It is not for Morrises to decide and so they will not argue whether the Court can, should or will address whether the ICRA amendments withstand equal protection or due process challenges. But, as revealed by their statement of interest, Morrises have an abiding determination to see the ICRA amendments scrutinized on these grounds matched by well-founded confidence that they will be found lacking. Consequently, they offer this brief in the event the Court decides it is appropriate to address the equal protection and due process flaws in the ICRA amendments as the Petitioner has invited it to.

E. Morrises join with Idaho in pointing out, however, that the acceptance of Petitioner's arguments in support of Congress' attempt to affirm inherent sovereignty which this Court held no longer existed has tremendous consequences for the future of not only the civil rights of Indians but, perhaps, for our constitutional structure resting on the federalism of a durable union of states. Petitioner argues, in rather bland and unrevealing terms, that under the Indian Commerce Clause, Congress may empower tribal governments to exercise non-constitutional, sovereign power over U.S. citizens with no connection to the tribe. Petitioner argues that Congress can take such action to "reaffirm" this power despite this Court's contrary holding, meaning as a practical matter that such congressional action is unreviewable. Because there is no beginning point in the Constitution for such broad,

unreviewable power, Petitioner's approach contains "no logical stopping point." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275-76 (1986). If there are cases where a strong argument can be made that in times of national peril, perhaps, certain rights may be limited in particular ways and as to particular people – though not defined as to their race – policing up misdemeanors is not that type of situation. If it is, there truly is no limit to federal power, at least in Indian country. Because the map of this Nation is spangled with Indian reservations, the rule Petitioner advocates, if accepted, would in due time allow an incredible flowering of federal power, via these reservations, to the great detriment of the states.

II. The ICRA Amendments Violate Equal Protection.

The plain language of the ICRA amendments establishes a racial classification. In Section 1301(2), Congress defined the self-government power of Indian tribes in an explicitly racial manner as "mean[ing] the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." In subsection four, Congress defined "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18. . . . " This language does not on its face limit the sweep of the section to only those Indians who are members of a tribe. This language says nothing about tribal membership whatsoever. Thus, the language of the ICRA amendments, which appears, at least, plain on its face, requires strict scrutiny under this Court's jurisprudence because it establishes a racial classification.

In the face of the plain language of the statute, Petitioner asserts that in fact Congress meant only to subject Indians who are members of some tribe to the criminal jurisdiction of all tribal courts, which, Petitioner claims, makes this classification "political" rather than racial. In that case, according to Petitioner, the amendments need only survive rational basis analysis, which it claims they easily do as a means to keep law and order on reservations. This argument lacks any merit because it has no factual or legal foundation.

First, as a factual matter, when Congress got around to holding hearings on the ICRA amendments after their initial enactment, the legislative history makes it unequivocally clear that it understood that it was subjecting Indians, as a race, not as members of tribes, to tribal criminal jurisdiction. See Statement, *supra*, at paragraph 2. Respected commentators have unequivocally condemned the ICRA amendments for this as violating equal protection. See *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, L. Scott Gould, Vol. 28, No. 1, U.C. Davis L. Rev. 53, 69-75. Professor L. Scott Gould concluded that the so-called *Duro* fix "although conceived by advocates of Indians and supported by Indians themselves, is ill suited to its purpose, *is inherently racist, and should be held unconstitutional.*" *Id.* (Emphasis added.)

Second, as a legal matter Petitioner's "political status" argument lacks any merit. As a matter of federal Indian law, the cases defining who is and who is not an "Indian" for purposes of 18 U.S.C. §1153, including the seminal

case, cited in the House Report, *United States v. Rogers*, 45 U.S. (How.) 567 (1846), make it clear that one need not be a tribal member to be an "Indian" for purposes of criminal prosecution under that statute. Those cases make it clear that one can be an "Indian" for purposes of 18 U.S.C. §1153, and therefore the ICRA amendments, without being a member of a tribe. *United States v. Broncheau*, 597 F.2d 1260, 1262-63 (9th Cir. 1979) ("Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative."); *United States v. Ives*, 504 F. 2d 935, 953 (9th Cir. 1974) ("[E]nrollment or lack of enrollment is not determinative of . . . status as an Indian."); *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir. 1938) ("The lack of enrollment . . . is not determinative of status. Only Indians are entitled to be enrolled . . . and the fact of enrollment would be evidence that the enrollee is an Indian. But the refusal of the Department of Interior to enroll a certain Indian as a member of a certain tribe is not necessarily an administrative determination that the person is not an Indian."); *United States v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976) ("The definition of exactly who is and who is not an Indian is very imprecise. (Citation omitted.) Courts have generally followed the test discussed in *United States v. Rogers*, 45 U.S. (4 How.) 567, (1846): in order to be considered an Indian, an individual must have some degree of Indian blood and must be recognized as an Indian.") Thus, since, 1846, the one immutable requirement to be an "Indian" for purposes of the statutory definition on which Congress relied is an immutable racial characteristic: the person's race must be, at least in part, Indian. *United States v. Rogers*, 45 U.S. 67, 4 How. 567, 572-73, 11 L.Ed. 1105 (1845). (By adoption into a tribe a non-Indian does not become an Indian.)

Most importantly, however, for this Court's equal protection jurisprudence and this country's maintenance of the progress it has made on that principle, it must be acknowledged that Petitioner's "political classification" argument is at best superfluous. Even if Congress limited the class of people it subjected to tribes' pre-constitutional criminal jurisdiction to tribal members (i.e., depriving "only" 1.7 million citizens of their rights rather than 4 million) every single one of those people would be an "Indian" by race. Not one non-Indian would suffer that treatment. At the very best, in that case, the person's membership in a tribe would be an additional factor, but race would be the one indispensable and obviously immutable characteristic of the class of U.S. citizens given such "special treatment."[10]

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[10] This ominous phrase is reminiscent of other racially discriminatory schemes. To paraphrase a recent argument of a well-respected Supreme Court advocate, submitted to the Court while in private practice,

> "Respondent's attempts to justify the [Congress'] race-based [classification] are disturbingly reminiscent of the 'Blood Protection' and 'Citizenship' laws adopted as part of the infamous Nuremburg Laws. Just as [Congress' classification] requires definitions of ['Indian'] according to blood quantum and the race of one's ancestors, the Nuremberg laws restricted the right to vote of persons with 'Jewish blood,' and contained detailed definitions of 'Jew' and 'mixed Jewish blood.' See 1 The Holocaust: Legalizing the Holocaust, The Early Phase, 1933-1939 at 23, 24, 31-32 (John Mendelsohn & David S. Detwiler eds., 1982); *Fullilove v. Klutznick*, 448 U.S., 534 n.5 (1980) (Stevens, J., dissenting) (quoting Nuremburg laws); cf. *Loving*, 338 U.S. at 5 n.4 (Virginia miscegenation laws defined 'white persons' as persons who have 'no trace whatever of any blood other than Caucasian,' and 'colored persons' as '[e]very person in whom there is ascertainable any

(Continued on following page)

In view of this, the ICRA amendments raise fundamental constitutional issues and should be analyzed as any other equal protection case is. As the Petitioner argued, successfully, not long ago in *Rice v. Cayetano*, 528 U.S. 495 (2000), the Constitution, in this case the Fifth Amendment,

> "requires strict scrutiny of all state-sponsored racial classifications, and invalidates those that are not narrowly tailored to achieve a compelling state interest. *Hunt v. Cromartie*, [526 U.S. 541 (1999)], *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496-97 (1989). Such classifications are 'immediately' and 'inherently' suspect (*Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Miller v. Johnson*, 515 U.S. 900, 904 (1995) (citation omitted)), because '[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Where, as

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> Negro blood'); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 633 n.1 (1990) (Kennedy, J., dissenting) ('Other examples are available. See Population Registration Act No. 30 of 1950, Statutes of the Republic of South Africa 71 (1985).')."

As Mr. Olson there said:

> "These notions – that individuals should be judged by their ['Indian blood,'] 'Jewish blood,' 'Negro blood,' and the like – are the inevitable consequence of respondent's approach, and are entirely alien to our Constitution. 'Indeed, the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals.' *Fullilove*, 448 U.S. at 534 n.5 (Stevens, J., dissenting)."

Mr. Theodore B. Olson, Petitioner's Brief, page 27, note 11, in *Rice v. Cayetano*, 528 U.S. 495 (2000).

here, race discrimination is apparent on the face of the statute, '[n]o inquiry into legislative purpose is necessary.' *Shaw v. Reno*, 509 U.S. 630, 642 (1993)." Brief for Petitioner at 28-29, *Rice v. Cayetano*, filed May 27, 1999, Mr. Theodore B. Olson, counsel of record.

Morrises cannot hope to improve upon the framework for analyzing statutes such as the ICRA amendments that on their face raise equal protection concerns set out by the successful Petitioner in *Rice v. Cayetano*, *supra*:

> "'[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.' *Shaw v. Reno*, 509 U.S. at 643-44 (citation omitted). '[W]henever the government treats any person unequally because of his or her race, that person suffered an injury that falls squarely within the language and the spirit of the Constitution's guarantee of equal protection.' *Adarand*, 515 U.S. at 229-230. Thus, a government may impose racial classifications only as a 'last resort.' *Croson*, 488 U.S. at 519 (Kennedy, J.). An interest is 'compelling' only when it rests on a 'strong basis in evidence' that government action favoring one race over another is both 'necessary' and 'legitimate.' *Croson*, 488 U.S. at 493, 500; *Adarand*, 515 U.S. at 226, 228, 236. Similarly, a classification is 'narrowly tailored' only when a government has no other choice – when it legitimately has attempted or considered alternative means and determined that they do not or cannot succeed. . . . " *Id.* at 30.

Applying this analysis here, the plain language of the statute, the operation of the statutory definition on which it relies, and the legislative history all demonstrate the ICRA amendments are, and were intended to be, a burden to only one race. As such, they violate equal protection.

III. The ICRA Amendments Violate the Fundamental Fifth Amendment Right to Due Process Because They Subject U.S. Citizens to Trial and Punishment, Including Possibly Incarceration, by Sovereign Governments Within the Territory and Subject to the Power of the United States but Not Required to Comply with Constitutional Guarantees.

Only in narrowly defined and extraordinary circumstances may the United States prosecute citizens of the United States in tribunals not required to accord the defendant all the protections of the Constitution and its amendments. *Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957). The need or desire to prosecute misdemeanor defendants cannot represent such circumstances. Yet the ICRA amendments, leaving aside for the moment their racially discriminatory aspect, clearly, knowingly subject U.S. citizens to the power of sovereigns unconstrained by the Constitution. This power is real. Tribes may fine a convicted defendant up to $500.00 and imprison him for up to a year in tribal jail for each offense. Even the power of Congress over Indians is limited by their rights as U.S. citizens.

> "Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right. Cf. *Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957). We have approved delegation to an Indian tribe of the authority to promulgate rules that may be enforced by criminal sanction in federal court, *United States v. Mazurie*, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975), but no delegation of

> authority to a tribe has to date included the power to punish non-members in tribal court. We decline to produce such a result through recognition of inherent tribal authority."

Duro v. Reina, 495 U.S. 676, 110 S.Ct. 2053, 2063-2064 (U.S.Ariz. 1990).

Simply put, Congress cannot constitutionally authorize a political entity within the confines of the United States and under its control to exercise criminal jurisdiction over U.S. citizens without according them the full panoply of basic constitutional rights. First among these are the rights of political participation, i.e., consent, from which all other government power flows. See *Duro*, 110 S.Ct. at 2064, citing *Reid v. Covert*, 354 U.S. 1 (1957).

As a U.S. citizen, Thomas Morris has a constitutional right to be tried, when accused of a crime as he is now, by courts that comply with the law of the land. The tribal Court does not, nor is it required to. It is unfathomable, then, that Congress could simply ignore Morris's rights as a U.S. citizen and subject him to such a tribunal.

CONCLUSION

The Petitioner's approaches to due process and equal protection invite all manner of laws that would increase the racial balkanization of America, at least in Indian country. Congress' selection of Indians for adverse "special treatment" by non-constitutional criminal tribunals is inconsistent with more than a century of painful lessons taught by the Civil War and by this Court's carefully wrought interpretation of the constitutional amendments

that followed it and of the Fifth Amendment. If our Nation's struggles with race discrimination have taught one lesson, it is that when we distort the Constitution in the service of or to the detriment of one race, we do the gravest injustice to our Nation, and to the people. The ICRA amendments should be held to violate the Fifth Amendment's due process and equal protection guarantees.

Respectfully submitted,

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[SEAL] **U.S. Department of Justice**
Criminal Division

Washington, D.C. 20530

April 17, 2001

Honorable Cathy Catterson
Clerk, United States Court of Appeals
For the Ninth Circuit
95 Seventh Street
San Francisco, CA 94105

Re: *Morris* v. *Tanner,* No. 99-36007
Argued and Submitted 3/8/01
Rule 28(i) Letter

Dear Ms. Catterson:

Would you kindly bring this letter to the attention of the panel in this case.

In the government's amicus brief in this case, at page 31, we cited to *Nofire* v. *United States*, 164 U.S. 657, 661-662 (1897), for the proposition that a non-Indian by ancestry was an "Indian" for criminal jurisdiction purposes when he was adopted by an Indian tribe. On closer inspection, *Nofire* does not stand for that proposition. *Nofire* involved a special federal statute that granted the Cherokee Nation exclusive jurisdiction over cases where all parties were members of the tribe, including specifically, adopted members, notwithstanding the existence of federal jurisdiction. See 164 U.S. at 658; *Alberty* v. *United States,* 162 U.S. 499, 502 (1896). The general rule is that a non-Indian cannot, through his adoption by a tribe, define himself as an "Indian" for purposes of determining federal criminal jurisdiction. See *Duro* v. *Reina*, 495 U.S. 676, 694 (1990), citing *United States* v. *Rogers*, 45 U.S. 567 (1846). Nevertheless, "*Indian*" status for purposes of federal

criminal jurisdiction requires voluntary membership or affiliation with a federally recognized tribe. See *LaPier* v. *McCormick*, 986 F.2d 303, 305 (9th Cir. 1992); *United States* v. *Heath*, 509 F.2d 16, 19 (9th Cir. 1974); see generally S. Rep. 102-168, 102nd Cong., 1st Sess. App. C, pp.48-54 (1991) (legislative history of 1990 ICRA amendment). For equal protection purposes, this makes Congress' classification of "Indians" for federal criminal jurisdiction purposes one based on political affiliation with a tribe, not one based on race. See *United States* v. *Antelope*, 430 U.S. 641, 645-650 (1977).

In the 2000 Census, 4,119,301 persons identified themselves as being at least partly American Indian or Alaska Native. See Census 2000 Brief, Overview of Race and Hispanic Origin, p. 8, Table 6 (U.S. Dept. of Commerce, Economics and Statistics Administration U.S. Census Bureau March 2001) (copy attached). As of 1999, the total enrollment of the 556 federally recognized tribes (including recognized Alaskan Native Groups) was 1,698,483 persons. See 1999 Indian Labor Force Report p. i, (U.S. Department of the Interior, Bureau of Indian Affairs Office of Tribal Services 1999) (copy attached).

Respectfully submitted,

/s/ Richard A. Friedman

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELIZABETH S. MORRIS, gal, THOMAS LEE a minor child by and through his guardian, his natural parents; RONALD J. MORRIS, SR., gal, THOMAS LEE a minor child by and through his guardian, his natural parents,

Plaintiffs-Appellants,

v.

TANNER, Judge, Judge of the CONFEDERATED SALISH and KOOTENAI INDIAN TRIBAL COURT for the FLATHEAD RESERVATION,

Defendant-Appellee.

No. 99-36007

D.C. No. CV-99-82-DWM

MEMORANDUM*

(Filed Jul. 24, 2001)

Appeal from the United States District Court
District of Montana
Donald W. Malloy, District Judge, Presiding

Argued and Submitted on March 8, 2001
Seattle, Washington

Before: PREGERSON, THOMAS, and GOULD, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Plaintiff-appellant Thomas Lee Morris ("Morris"), by and through his guardians and natural parents, Elizabeth S. Morris and Ronald J. Morris, Sr., brings this declaratory and injunctive relief action challenging the constitutionality of the 1990 amendments to the Indian Civil Rights Act ("ICRA") (hereinafter referred to as the "1990 amendments" or the "1990 ICRA amendments").

Morris is an enrolled member of the Minnesota Chippewa Tribe, Leech Lake Reservation, Minnesota. He is not a member of the Confederated Salish & Kootenai Tribes of the Flathead Reservation (the "Confederated Tribes"). On June 13, 1999, Morris was driving a car near Ronan, Montana, within the territory of the Confederated Tribes, when a Ronan City Police officer cited Morris for speeding and ordered him to appear in the Flathead Reservation Tribal Court ("Tribal Court"). Morris appeared in the Tribal Court, entered a plea of not guilty, and filed a motion to dismiss the complaint against him. His motion was denied by the defendant, Judge Tanner, of the Confederated Tribes.

Morris next filed the present action in federal district court, seeking a declaration that the Confederated Tribes lack criminal jurisdiction over him because he is an Indian who is a member of another tribe (a "non-member Indian"). Morris also seeks an injunction prohibiting the Confederated Tribes from continuing to exercise criminal jurisdiction over him in light of his non-member Indian status.

The district court dismissed Morris's complaint on the ground that the 1990 ICRA amendments permit tribes to exercise criminal jurisdiction over non-member Indians. In so ruling, the district court did not address Morris's

allegations in the complaint that the 1990 amendments violate the equal protection component implicit in the Due Process Clause of the Fifth Amendment, and the principle of separation of powers. Morris timely appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we reverse.

I.

The District Court Erred In Granting Defendant's Motion to Dismiss Without Addressing the Constitutional Issues Raised in the Complaint

As set forth above, in granting the defendant's motion to dismiss, the district court found only that the 1990 amendments permit the Confederated Tribes to exercise criminal jurisdiction over non-member Indians such as Morris. The district court did not address Morris's assertions in the complaint that the 1990 amendments themselves are constitutionally infirm, because they violate his right to equal protection and the principle of separation of powers.[2]

[2] Specifically, Morris's complaint includes four causes of action through which he seeks the following relief: (1) a declaration that the Tribal Court lacks inherent criminal jurisdiction over Morris, a non-member Indian; (2) a declaration that regardless of whether the Tribal Court's criminal jurisdiction over Morris derives from the 1990 amendments or federal common law, the exercise of that authority violates Morris's right to due process; (3) a declaration that regardless of whether the Tribal Court's criminal jurisdiction over Morris derives from the 1990 amendments or federal common law, the exercise of that authority violates Morris's right to equal protection; and (4) a declaration that the 1990 amendments are unconstitutional because they violate the principle of separation of powers. In conjunction with each of these requests for declaratory relief, Morris also seeks an injunction

(Continued on following page)

The fact that the district court erred in dismissing the complaint without addressing the alleged constitutional violations, however, does not mean that we must reverse the district court's decision granting the defendant's motion to dismiss. Under the law of this circuit, we may "affirm the district court's dismissal for failure to state a claim on any basis fairly supported by the record." *Kimes v. Stone,* 84 F.3d 1121, 1126 (1996) (citing *Janicki Logging Co. v. Mateer,* 42 F.3d 561, 564 (9th Cir. 1994)). Thus, we must consider whether the district court's decision dismissing Morris's complaint is otherwise supported by the record. If the record supports the dismissal of Morris's complaint, then the district court's error in failing to address Morris's constitutional claims was harmless.

II.

The District Court's Dismissal of Morris's Complaint Was Not Harmless Error

The defendant suggests two reasons why the district court's decision to dismiss Morris's complaint amounts to harmless error. First, the defendant argues that under the ICRA, Morris may only challenge the constitutionality of the Confederated Tribes' exercise of criminal jurisdiction over him by means of a habeas petition rather than through the present action for declaratory and injunctive relief. Second, the defendant argues that Morris's constitutional claims lack merit because the Confederated Tribes' exercise of criminal jurisdiction over Morris is not subject

prohibiting the Tribal Court from exercising criminal jurisdiction over him.

to the constraints of the Constitution. Because both of these arguments lack merit, we find that the district court should have reached the merits of Morris's constitutional claims.

First, Morris may properly challenge the constitutionality of the 1990 amendments in the present suit for declaratory and injunctive relief. The defendant correctly notes that under the ICRA, 25 U.S.C. § 1303, a habeas petition is the "exclusive means for federal-court review of tribal criminal proceedings." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 67 (1978) (interpreting 25 U.S.C. § 1303 to mean that there is no implied right of action in federal district court for declaratory and injunctive relief under the ICRA). However, Morris's case is framed not as a challenge to the jurisdiction of the tribal court, but rather as a challenge to an act of Congress. As Morris explains, "[t]he issue is not whether Tribes are subject to constitutional limitations and judicial review but whether Congress is."

By framing his argument as a challenge to an act of Congress, Morris avoids the remedial constraints of 25 U.S.C. § 1303. Although *Santa Clara Pueblo* held that under 25 U.S.C. § 1303 there is no implied right of action for declaratory and injunctive relief to enforce the substantive provisions of the ICRA, 436 U.S. at 51-52, Morris does not bring this suit pursuant to the ICRA. Rather, this suit arises under the court's federal question jurisdiction to review the constitutionality of congressional legislation. *See* 28 U.S.C. § 1331. Therefore, 25 U.S.C. § 1303 does not prevent the district court from reaching the merits of Morris's constitutional claims.

The defendant's second argument – that Morris's constitutional claims lack merit because the Confederated Tribes' exercise of criminal jurisdiction over Morris is not subject to the constraints of the Constitution – is similarly unavailing. Under our recent decision in *United States v. Enas,* 2001 WL 726669 (9th Cir. 2001), it is undisputed that the Confederated Tribes could not presently exercise criminal jurisdiction over Morris, a non-member Indian, in the absence of the 1990 amendments. The 1990 amendments may therefore be characterized as *enabling* the Confederated Tribes's exercise of criminal jurisdiction over Morris. This enabling legislation is subject to constitutional review and must comport with the equal protection component of the Fifth Amendment and the principle of separation of powers. Therefore, because Morris has framed his appeal as an attack on the constitutionality of the 1990 amendments rather than as an attack on the constitutionality of the Confederated Tribes's exercise of criminal jurisdiction, the district court must reach the merits of Morris's constitutional claims.

III.

The Question Whether the 1990 ICRA Amendments Violate the Principles of Equal Protection and Separation of Powers is Remanded to the District Court to Consider in the First Instance

Because the district court dismissed Morris's complaint without addressing the constitutional issues raised therein, we remand this matter to the district court to consider in the first instance whether the complaint adequately states a claim for relief. Thus, the district court must consider the question whether the 1990 ICRA

amendments violate the equal protection component of the Fifth Amendment or the principle of separation of powers.

In considering whether the 1990 amendments violate the Fifth Amendment,[3] the district court should consider whether the term "Indian" as used in the 1990 amendments amounts to a political or racial classification. If the district court finds that the classification is racial, it should also consider whether the 1990 amendments satisfy strict scrutiny. If the district court finds that the classification is political, it should also consider whether the 1990 amendments satisfy rational basis review. The district court should further consider the reach of the 1990 amendments, and whether the amendments apply to "Indians" who are not enrolled in, or otherwise affiliated with, any tribe. In connection with these inquiries, the district court may wish to hold a hearing to further develop the factual record.

The district court should consider Morris's claim that the 1990 amendments violate the principle of separation of powers in light of our recent decision in *United States v. Enas*, 2001 WL 726669 (9th Cir. 2001).

IV.

Conclusion

For the reasons set forth above, the district court's decision granting the defendant's motion to dismiss for

[3] It is not clear whether Morris's complaint includes a due process claim that is separate from his equal protection claim. The district court should also consider this issue on remand.

failure to state a claim is reversed, and the matter is remanded to the district court for further proceedings consistent with this disposition. The panel shall retain jurisdiction over this case.

REVERSED AND REMANDED.

TITLE I

CHAPTER 1

CONSTITUTION AND BYLAWS

Part 1

Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, as Amended

Article II

Section 2. Present Membership. Membership in the Tribes on and after the date of the adoption of this amendment shall consist of all living persons whose names appear on the per capita roll of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, as prepared for the per capita distribution as shown on the per capita roll paid in February 1959 together with all children of such members, born too late to be included on such per capita roll and prior to the effective date of this section who posses one-fourth (¼) or more Salish or Kootenai Blood or both and are born to a member of the Confederated Tribes of the Flathead Indian Reservation. Subject to review by the Secretary of the Interior, The Tribal Council shall make any necessary corrections in this 1959 membership roll so that no one eligible for membership under prior constitutional provisions shall be excluded therefrom.

Section 6. Definitions. Wherever the term "Indian Blood" shall have been used herein or in tribal ordinances, unless the context shall require a different meaning, it shall be determined to mean the blood of either or both the Kootenai or the Salish Tribes of the Flathead Reservation.

Law and Order Code of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, 2003

Part 2. Tribal Court Judges:

1-2-202. Appointment, staggered terms, and advertisement. (1) Each Tribal Court Judge shall be appointed by a majority of a quorum of the Tribal Council for a term of four years. Any applicable term shall begin on October 1 of the Calendar year. The terms of the Tribal Court Judges shall be staggered in relation to each other.

* * *

(5) A person shall be eligible to serve as a Tribal Court Judge only if the person (i) is a member of the Confederated Salish and Kootenai Tribes, and (ii) has never been convicted of a felony, or, within one year then last past, of a misdemeanor, with the exception of minor traffic violations.

* * *

Part 6. Juries and Witnesses:

1-2-601. Composition of venire. The Tribal Council each year shall prepare a list of eligible jurors. Such eligible jurors shall be residents of the Flathead Reservation and enrolled members of the Tribes who are qualified to vote in elections of the Council.

Supreme Court, U.S.
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(10)

No. 03-107

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

BILLY JO LARA,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CITIZENS EQUAL RIGHTS FOUNDATION IN SUPPORT OF RESPONDENT IN PART

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3118

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of Amicus Curiae	1
Summary of the Argument	2
Argument	5
I. Constitutional Principles Guided the Determinations in *Oliphant, Wheeler,* and *Duro* that Retained Inherent Criminal Jurisdiction Does Not Extend to Non-Members	5
II. Interpreting the Constitutional Limitations on Inherent Tribal Sovereignty are the Exclusive Province of this Court.	12
A. The Dependent Status of Tribes is Derived from Constitutional Principles Which Hold that Tribal Criminal Jurisdiction Over Non-Members is Inconsistent with their Dependent Status.	12
B. The Fundamental Constitutional Rights of All Citizens Cannot be Diminished by Congressional Action that is Inconsistent with the Requirements of the Constitution.	15
C. The Citizenship of the Indian People Operates to Limit the Inherent Power of Tribal Governments Over Non-Members.	20
Conclusion	25

TABLE OF AUTHORITIES

Cases: **Pages**

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 6, 12-13

City of Milwaukee v. Illinois and Michigan, 451 U.S. 304 (1981) 2

Clinton v. City of New York, 524 U.S. 417 (1998) 2

Cohen v. Little Six, Inc., 543 N.W.2d 376 (Minn. App. 1996), *aff'd* 561 N.W.2d 889 (Minn. 1997) 4

County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251 (1992) 13, 16

Draper v. United States, 164 U.S. 240 (1896) 15

Duro v. Reina, 495 U.S. 676 (1990) ..... passim

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 6, 12

Heath v. Alabama, 474 U.S. 82 (1985)..... 8

Hirabayashi v. United States, 320 U.S. 81 (1943)..... 22

In Re Ross, 140 U.S. 453 (1891) 18-19

Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823)..... 6, 12, 13

Kafflin v. Levitt, 493 U.S. 455 (1990) 14

TABLE OF AUTHORITIES

Cases Cont.: **Pages**

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 2, 3, 7, 17

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 23

Montana v. United States, 450 U.S. 544 (1981)..... 8, 14

Morton v. Mancari, 417 U.S. 535 (1974) 22

Nevada v. Hicks, 533 U.S. 353 (2001)..... 14-15, 17, 19, 22

New Jersey v. New York, 283 U.S. 336 (1931) 2

Oliphant v. Suquamish Indian Tribes, 435 U.S. 191 (1978)..... passim

Reid v. Covert, 354 U.S. 1 (1957)..... 9, 16-19

Rice v. Cayetano, 528 U.S. 495 (2000) 22

Saenz v. Roe, 526 U.S. 489 (1999) 5, 21

Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) 21

South Dakota v. Bourland, 508 U.S. 679 (1993) 3, 14

Talton v. Mayes, 163 U.S. 376 (1896) 9, 20

Pages

Cases Cont.:

United States v. Enas, 255 F.3d 662 (9th Cir. 2001) (*en banc*) 3

United States v. Kagama, 118 U.S. 375 (1886) 3, 13-15, 17

United States v. Lara, 324 F.3d 635 (8th Cir. 2003) (*en banc*), *cert. granted*, 124 S.Ct. 46 (2003)..... 3, 4

United States v. Mazurie, 419 U.S. 544 (1975)..... 10

United States v. Rogers, 45 U.S. (4 How.) 567 (1846) 6

United States v. Wheeler, 435 U.S. 313 (1978)....2, 3, 5, 7-8

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 12-13, 15

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 4, 23

Statutes:

United States Constitution:

Amend. X 14

Amend. XIV 19-20

Art. I, §8 (Commerce Clause) 12, 13

Art. I, §9 21

Art. III 2

Art. III, §2 17

Bill of Rights 6, 9-11, 16-19, 24

Pages

Other Statutes:

General Allotment Act of 1887 (Dawes Act), 24 Stat. 388 (current version at 25 U.S.C. §331, *et seq.*) 16, 20

Indian Civil Rights Act of 1968, 25 U.S.C. §1301, *et seq.* 2, 4, 7, 9-10, 15, 19, 25

Indian Citizenship Act of 1924, Public Law No. 68-175 (current version at 8 U.S.C. §1401(b)). 21

Secondary Authorities:

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Declaration of Independence, ¶2 23

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INTEREST OF AMICUS CURIAE

The Amicus Curiae,[1] Citizens Equal Rights Foundation ("CERF") is a foundation established by Citizen's Equal Rights Alliance ("CERA"), a South Dakota non-profit corporation with members in 34 states. CERF was established to protect and support the constitutional rights of all people, both Indian and non-Indian, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact the constitutional rights of citizens. CERF is particularly concerned that all people who reside within the boundaries of original reservations, and particularly those who reside on fee lands, will be denied the full protection of the United States Constitution if they are made subject to the regulatory and adjudicative authority of tribal government. CERF has a critical interest in this case because CERA has members who own residential, recreational, agricultural and commercial land and businesses within the original boundaries of various Indian reservations in the United States. CERA's members include Indians residing on reservations where they are not members of that tribe. The actions of tribal governments, whether through regulatory or adjudicative authority, have impacted and have the potential to impact the fee owned lands and businesses of the United States citizens and the fundamental rights of individuals who are not members of tribal governments.

All parties have consented by written stipulation to the filing of this Amicus Brief.

---

[1] Pursuant to Rule 37.6 of this Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than amicus curiae, its members or its parent CERA's members, or its counsel have made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This brief focuses on the issue of whether inherent tribal sovereignty over non-members has been terminated by constitutional principles. This issue is central to the determination before the Court, because the Petitioner argues that the amendment to the Indian Civil Rights Act of 1968, 25 U.S.C. 1301(2), that "recognized and affirmed" the "inherent power" of Tribes to "exercise criminal jurisdiction over all Indians" should be read and applied according to its plain language to override the decision in *Duro v. Reina*, 495 U.S. 676 (1990).

To reach this conclusion, the Petitioner claims that the decision in *Duro* can be reversed by congressional enactment. The principles laid down in *Duro* were a logical extension of the Court's decisions in *Oliphant v. Suquamish Indian Tribes*, 435 U.S. 191 (1978) and *United States v. Wheeler*, 435 U.S. 313 (1978). If the principles that guided the Court's interpretation in *Duro* were derived from the Constitution, then it is the exclusive province of this Court "to say what the law is" as a core function of its judicial power. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Once the Court has interpreted the Constitution, under its Article III powers, Congress cannot override the decision through legislation. *Cf. Clinton v. City of New York*, 524 U.S. 417, 446-49 (1998) ("change must come not by legislation but through amendment").

The Petitioner argues, however, that the principles of Indian law, including the doctrine enunciated in *Duro*, are mere pronouncements of "federal common law" that fill a gap only until it must yield to the "paramount authority of Congress." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 313-14 (1981) *quoting New Jersey v. New York*, 283 U.S. 336, 348 (1931). The Ninth Circuit's decision in

United States v. Enas, 255 F.3d 662 (9th Cir. 2001) (*en banc*) determined that *Duro* was a common law decision subject to congressional modification. *Id.* at 674-75. The Eighth Circuit in the decision below determined that the "distinction between a tribe's inherent and delegated powers is of a constitutional magnitude and therefore is a matter ultimately entrusted to the Supreme Court." *United States v. Lara*, 324 F.3d 635, 639 (8th Cir. 2003) (*en banc*).

Put simply, this brief addresses the following question: is the claim that Congress has recognized inherent criminal jurisdiction by tribal courts over non-members barred by this Court's interpretation of the requirements of the Constitution, or is this issue subject to complete congressional prerogative under Congress' "plenary power" over Indian affairs. *See, United States v. Kagama*, 118 U.S. 375 (1886). Because constitutional principles have guided and informed nearly two centuries of judicial interpretation, this Court has stated "what the law is": tribal jurisdiction over non-members is "*not* inherent." *Marbury v. Madison; South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993) (emphasis in original).

We begin with an in depth examination of the Court's decisions in *Duro*, *Wheeler* and *Oliphant*. All three reveal that the Constitution limits inherent tribal sovereignty, whether the problem is considered from the perspective of the "dependent status" of Indian tribes, the inability of Congress to act contrary to the Constitution, or the rights of citizens.

After examining the constitutional principles laid down in *Oliphant*, *Wheeler* and *Duro*, the Amicus Curiae examine additional constitutional precedents of this Court, both inside and outside of Indian law, in the areas of Tribal Sovereignty, Congressional Power and the Rights of Citizens.

The limits on "inherent tribal sovereignty" are not simply a creation of federal common law. Indeed, the position

advanced by the Petitioner faces two insurmountable obstacles. First, tribes are not only in a "dependent status" in relation to the national sovereign; the ultimate source of sovereignty in the United States is its citizens. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). It is inherently contradictory to argue that the citizens of the ultimate sovereign, who are the original source of the sovereign powers of the national government, can be subject to the lesser "inherent retained jurisdiction" of Indian tribes in a "dependent status."

The second insoluble contradiction is the legislative attempt, in the *Duro* amendment to the Indian Civil Rights Act, to "recognize and affirm" the "inherent power" of tribes over non-member Indians. Since inherent sovereign power over non-members is inconsistent with the dependent status of tribes, *Oliphant*, 435 U.S. at 208, Indian tribes have not held the inherent power to criminally prosecute non-members since they entered into the "dependent status." No power is truly "inherent" if it depends upon the action of another sovereign to recognize, grant, affirm or create it. Yet this is precisely what the *Duro* amendment to the Indian Civil Rights Act attempted.

Not surprisingly, the response of the Eighth Circuit Court of Appeals was an attempt to salvage this unconstitutional effort by finding the amendment was simply a delegation of federal authority that allowed tribes to prosecute non-member Indians. *United States v. Lara*, 324 F.3d at 640.

Justice Randall, in his dissent in *Cohen v. Little Six, Inc.*, 543 N.W.2d 376 (Minn. App. 1996), *aff'd* 561 N.W.2d 889 (Minn. 1997) struggled with the issue of subjecting non-members to tribal court systems. In the area of tribal governance over non-members he asks "how does the federal government give more than it possesses?" *Id.* at 406 (J.

Randall dissent). The answer, of course, is that Congress cannot "give" inherent sovereignty over non-members to tribal governments. When Congress acts, it must act according to the Constitution and any power that it delegates must of necessity be federal power, whose exercise is subject to the Constitution. *Compare*, *Saenz v. Roe*, 526 U.S. 489, 508 (1999).

In the final section, we examine how the rights of all citizens are inconsistent with the claim that tribes retained inherent criminal jurisdiction over non-members.

ARGUMENT

I. Constitutional Principles Guided the Determinations in *Oliphant, Wheeler, and Duro* that Retained Inherent Criminal Jurisdiction Does Not Extend to Non-Members.

The Petitioner argues that the exercise of tribal criminal jurisdiction over non-member Indians has been restricted only by federal common law, leaving Congress free to override judicial pronouncements and thereby "re-establish" inherent tribal sovereignty. Leaving aside the unavoidable contradiction of a separate sovereign recreating inherent power, we examine whether the foundation laid for this court's decision in *Duro* is without constitutional support.

We turn first to *Oliphant* for an analysis of the grounds that supported its holding. Contrary to the Petitioner's position, the Court found that the limits on tribal sovereignty are not transcribed only by treaties, congressional actions, or executive orders.

> But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or

> congressional enactments....Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers '*inconsistent with their status*' *Oliphant*, 435 U.S. at 208 [*citation omitted*] (emphasis in original).

Oliphant established that while Congress could terminate retained tribal powers, the dependent status of tribes had already terminated their inherent powers over non-Indians.

Building on its observation that external jurisdictional powers were inconsistent with the dependent status of tribes, the Court noted that tribal reservations are part of the territory of the United States. This fact diminished tribal sovereignty as independent nations, and limited the power tribes might have inherently enjoyed to dispose of lands without the consent of the United States; eliminated tribal power to form political connections with foreign nations; and limited sovereignty so that tribes lost their right of governing every person within their territorial limits except themselves. *Id.* 435 U.S. at 208-209, *citing United States v. Rogers,* 45 U.S. (4 How.) 567, 571 (1846), *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831); and *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810).

Not content with simply describing the dependent status of tribes in light of the national government's preeminent territorial sovereignty created by the Constitution, the Court turned to the fundamental protections granted to its citizens.

> But from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their

> personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily gave up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. *Oliphant* at 210.

The Court closed its decision in *Oliphant* by noting that while tribal court systems have increasingly begun to resemble their state counterparts, and acknowledging that the passage of the Indian Civil Rights Act of 1968 extended certain basic procedural rights to all persons tried in Indian Tribal Court:

> [These factors] have little relevance to the principles which lead us to conclude that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians. *Id* at 212.

To claim that the principles delineated in *Oliphant* are simply the creation of federal common law ignores the constitutional principles which the court was careful to delineate and distinguish from the treaties, legislative enactments and executive orders that also supported its holding. Since it is exclusively the province of this court "to say what the law is" *Marbury v. Madison*, 1 Cranch at 177, the primacy of judicial interpretations of the Constitution is clearly established.

Sixteen days after the *Oliphant* decision, this Court held in *United States v. Wheeler* that the inherent power of tribes to try and punish its own tribal members was not inconsistent with a tribe's dependent status under our constitutional system and therefore tribes retained this inherent power. As a

result, the double jeopardy defense to a federal prosecution following conviction of the tribal member in Navajo tribal court failed because the criminal prosecution arose from the tribe's inherent sovereignty, not delegated federal power. *Id.* 435 U.S. at 322-26. *Compare*, *Heath v. Alabama*, 474 U.S. 82, 88 (1985).

Twelve years after *Oliphant* and *Wheeler*, the court was faced with the case "at the intersection" of these two precedents in *Duro v. Reina,* 495 U.S. at 684. The *Duro* court examined judicial precedents that define the parameters of tribal power in relationship to non-members, beginning with the restrictions on territorial sovereignty. *Wheeler*, the *Duro* court reasoned, revealed "the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order." *Id.*, 495 U.S. at 685-86. An "implicit divestiture of sovereignty" occurs for relations between an Indian tribe and non-members of the tribe, as a result of the tribe's "dependent status." *Id.*

Montana v. United States, 450 U.S. 544 (1981) held that "the principles on which [*Oliphant*] relied support the general proposition that the inherent sovereign powers of an Indian tribe did not extend to the activities of non-members of the tribe." *Duro*, 495 U.S. at 687 *citing Montana*, 450 U.S. at 565. Finding that criminal jurisdiction "involves a far more direct intrusion on personal liberties," the Court held that for criminal jurisdiction purposes, a non-member Indian's "relations with this Tribe are the same as the non-Indian's in *Oliphant*." *Duro*, 495 U.S. at 688.

Lest there be any doubt as to the constitutional basis for its decisions, the Court in *Duro* made these critical holdings:

> Whatever might be said of the historical record, we must view it in light of Petitioner's status as a citizen of the

> United States....Indians like other citizens are embraced within our Nation's 'great solicitude that its citizens be protected...from unwarranted intrusions on their personal liberty.' *Oliphant,* 435 U.S. at 210.
>
> We hesitate to adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them. As full citizens, Indians share in the territorial and political sovereignty of the United States. The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members. Indians like all other citizens share allegiance to the overriding sovereign, the United States. A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority. *Duro*, 495 U.S. at 692-93.

The Court in *Duro* carefully considered the nature of tribal courts including the unique customs, the lack of judicial independence and unfamiliar practices. "It is significant that the Bill of Rights does not apply to Indian tribal government." *Id.*, citing *Talton v. Mayes*, 163 U.S. 376 (1896). While noting that the Indian Civil Rights Act of 1968 provided some procedural safeguards, "these guarantees are not equivalent to their constitutional counterparts" including the right to appointed counsel. *Duro*, 495 U.S. at 693.

> Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right. *Cf. Reid v. Covert*, 354 U.S. 1 (1957). We have approved

> delegation to an Indian tribe of the authority to promulgate rules that may be enforced by criminal sanctions in *federal* Court, *United States v. Mazurie*, 419 U.S. 544 (1975), but no delegation of authority to a tribe has to date included the power to punish non-members in *tribal* Court. We decline to produce such a result through recognition of inherent tribal authority." *Duro,* 495 U.S. at 693-94. (emphasis in original)

The Court in *Duro* examined the basis of tribal criminal jurisdiction over its own members. In doing so, the Court recognized that the fundamental principles imbedded in the Declaration of Independence and the Constitution, that all legitimate governmental authority is derived from the consent of the governed, is equally applicable to the limitations placed on the retained powers of tribal government.

> Retained criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in tribal government, the authority of which rests on consent. This principle finds support in our cases decided under provisions that predate the present federal jurisdictional statutes. …
>
> With respect to such internal laws and usages, the tribes are left with broad freedom not enjoyed by any other governmental authority in this country. … [noting that the Bill of Rights is inapplicable to tribes and there is no federal cause of action under the Indian Civil Rights Act] … **This is all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system.**

> *Duro*, 495 U.S. at 694 (citations omitted) (emphasis added).

Whether the question of inherent tribal sovereignty is considered from the perspective of tribal sovereignty, Congressional power or the rights of all American citizens, in each instance the Constitution informs and guides judicial interpretation.

1. **Tribal Sovereignty.** The "dependent status" of tribes by implication limits their inherent jurisdiction, and the only retained jurisdiction is derived from the consent of the governed (i.e. tribal members) that is the "fundamental basis for power within our constitutional system."
2. **Congressional Power.** "Constitutional limitations" prevent Congress from subjecting "American citizens to criminal proceedings before a tribunal" that does not provide full "constitutional protections."
3. **The Rights of Citizens.** All citizens are protected by the Constitution and the Bill of Rights which are not fully applicable to Indian tribal governments. Given that all Indians are now also United States citizens, their rights as U.S. citizens cannot be diminished through the exercise of "inherent tribal sovereignty" by any tribe unless the citizen is a member of that tribe.

Drawing on this trilogy of constitutional principles, *Duro* reached the inescapable conclusion that the inherent criminal jurisdiction of an Indian tribe does not and cannot extend to the activities of non-members of the tribe.

II. Interpreting the Constitutional Limitations on Inherent Tribal Sovereignty are the Exclusive Province of this Court.

A. The Dependent Status of Tribes is Derived from Constitutional Principles Which Hold that Tribal Criminal Jurisdiction Over Non-Members is Inconsistent with their Dependent Status.

An examination of the "dependent status" of tribes requires an examination of the so-called Marshall Trilogy, *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). The nature of title that the Indian tribes held to land arose in *Johnson v. M'Intosh*, where the Court determined that the right of conquest or discovery left the Indian tribes with a possessory right that was subject to complete defeasance. Chief Justice Marshall in his opinion relied in part on the decision in *Fletcher v. Peck*, where Justice Johnson reasoned that as a necessary consequence of the restricted title that Indian tribes held to the soil, tribal sovereignty was limited to the right of governing only "themselves." *Id.* 6 Cranch at 147 (J. Johnson concurring).

In *Cherokee Nation v. Georgia*, Chief Justice Marshall described Indian tribes as "domestic dependent nations." *Id.* 5 Pet. at 17. The United States asserts a title to the land occupied by the Indian tribes independent of their will, while these tribes are "in a state of pupilage" [which] "resembles that of a ward to his guardian." *Id.* In determining that tribes were not "foreign nations" but rather "domestic dependent nations," Justice Marshall found support in his interpretation of Article I, §8 "which empowers congress to 'regulate commerce with foreign nations, and among the several states, and with the Indian tribes.'" *Cherokee Nation*, 5 Pet. at 18. Tribes are not "foreign nations" and their sovereignty was therefore of necessity more limited. Justice Johnson again wrote a concurring opinion to

address the "Constitutional questions" presented. *Id.* 5 Pet. at 20.

In *Worcester*, Chief Justice Marshall held that the federal government held exclusive power, as a result of the Constitution, to regulate with regard to the Cherokee Nation. Accordingly, the Cherokee Nation, as a distinct community, occupying its own territory, was completely separated from the States, and state law could have no force within those lands. *Id.* 6 Pet. at 557-61. In *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992), the court noted that the "platonic notions of sovereignty" that guided Chief Justice Marshall in *Worcester* had lost their independent sway over time. *County of Yakima*, 502 U.S. at 257.

Unquestionably, interpretation of the Constitution lies at the heart of the Supreme Court's determination of the "dependent status" of Indian tribes. Those factors included both the language of the Commerce Clause, as well as the primacy represented by the United States as the supreme sovereign over all within her jurisdiction. The national sovereignty was created by the people through the Revolutionary War and expressed through the Constitution which creates "the government of the union." *See, Worcester*, 6 Pet. at 561. Congress is no freer to alter these constitutional principles central to our heritage and history than the Court is free to deny the title obtained by the conqueror. *See, e.g. Johnson v. M'Intosh*, 6 Pet. at 588.

One of the clearest statements by the Court that the existence of complete sovereign power is expressed through the Constitution is found in *United States v. Kagama*:

> Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the

> United States, or of the states of the Union. There exist within the broad domain of sovereignty but these two.

United States v. Kagama, 118 U.S. at 379; *also cited* in *Oliphant*, 435 U.S. at 211. This statement from *Kagama* clearly indicates that Congress in the exercise of "political control" can further restrict tribal sovereignty. *Kagama* cannot be read as authority for Congress to expand or recreate tribal inherent sovereignty. *See also*, *Nevada v. Hicks*, 533 U.S. 353, 366 (2001) referencing our "system of dual sovereignty," citing *Kafflin v. Levitt*, 493 U.S. 455, 458 (1990). The Tenth Amendment reserved for the States and the people all powers not granted to the government of the Union.

Montana v. United States, termed the "pathmarking case," relied upon the principles set forth in *Oliphant* to reach the conclusion that:

> Where nonmembers are concerned, the 'exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribe, and so cannot survive without express congressional delegation." *Hicks*, 533 U.S. at 359, quoting *Montana*, 450 U.S. at 564 (emphasis in *Hicks*).

South Dakota v. Bourland, 508 U.S. 679 (1993) held that "after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express delegation,' 450 U.S. at 564, and is therefore *not* inherent." *Bourland*, 508 U.S. at 695 n. 15 (emphasis in original).

As we have seen, the principles laid down in *Oliphant* are derived from both fundamental principles that underlie the Constitution and constitutional interpretations that limit "the retained inherent powers" of dependent tribes. Also clear is

that just as "Indians are within the geographical limits of the United States" (*Kagama*, 118 U.S. at 379), "an Indian reservation is considered part of the territory of the State," *Hicks*, 533 U.S. at 361. "[L]ong ago" the Court departed from Chief Justice Marshall's territorial limitations on states in *Worcester*. *Hicks*, 533 U.S. at 361. The court observed that the holding in *Worcester* must be considered in the light of the specific treaty with the Cherokee Nation that guaranteed that the land would not be subject to state jurisdiction. *Hicks*, 533 U.S. at 362, n.4.

Properly understood, the power of Congress over Indian affairs allows Congress to restrict the exercise of retained inherent sovereignty, just as Congress could limit the "States' inherent jurisdiction on reservations." *Hicks*, 533 U.S. at 365, citing *Draper v. United States*, 164 U.S. 240, 242-243 (1896). But Congress cannot expand or recreate inherent tribal criminal jurisdiction over non-members as it attempted by amending 25 U.S.C. §1301, because that limitation is derived from constitutional principles long enunciated by the Supreme Court and not simply federal common law.

B. The Fundamental Constitutional Rights of All Citizens Cannot be Diminished by Congressional Action that is Inconsistent with the Requirements of the Constitution.

Throughout the brief of the Petitioner, as well as in some amicus curiae briefs in support of the Petitioner, are repeated claims regarding the efficiency or necessity of allowing tribes to exercise criminal jurisdiction over all non-member Indians to eliminate a jurisdictional gap. The fact that non-Indian citizens, who comprise half of the residents on reservations across the

United States,[2] are not subject to tribal criminal jurisdiction without a significant jurisdictional gap, and that the same system could be applied to non-member Indians, has been ignored. More important, however, is the failure of the Petitioner and its amicus curiae supporters to recognize a more fundamental difficulty in the argument advanced. Except during hostilities or for military personnel, this Court has never sanctioned a diminution of the fundamental constitutional protections of American citizens within the United States in exchange for efficiency or convenience.

In *Reid v. Covert*, the Court was asked to determine the constitutionality of a statute that allowed family members of U.S. military personnel who were living overseas to be subject to trial by military tribunals, under military regulations and procedures, for criminal offenses. The statute deprived military dependents of trial in civilian courts, under civilian laws, and with the safeguards of the Bill of Rights. In rejecting the very efficiency argument now advanced by the Petitioner, the Court reasoned as follows:

> [The concept that the] Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and would undermine the basis of our government. *Id.*, 354 U.S. at 14. (plurality)

Reid carefully delineated the constitutional limitations on congressional power that prevent Congress from subjecting

[2] *See, Oliphant*, 435 U.S. at 202 n. 13; *Duro*, 495 U.S. at 695. Two-thirds of Indian lands allotted under the Dawes Act were acquired by non-Indians, *County of Yakima*, 502 U.S. at 255-56.

citizens to criminal prosecution by a tribunal that does not provide all of the constitutional protections.

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which is the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." *Id.*, 354 at U.S. 5-6 (plurality) (footnotes omitted).

Of particular importance is the court's citation to *Marbury v. Madison*, 1 Cranch at 176-180 in support of the constitutional interpretation quoted above.

All tribal lands are contained within the territorial jurisdiction of the United States, and ordinarily are considered part of the territory of a state. *See, Kagama*, 118 U.S. at 379 and *Hicks*, 533 U.S. at 361. The analogy to *Reid*'s holding regarding the limitations on military and foreign policy imposed by the Bill of Rights applies with equal, if not greater, authority to the claim that Congress in the exercise of "plenary power" over Indian affairs can expand inherent tribal jurisdiction over non-members within the United States, thereby "stripp[ing] away" essential constitutional protections. *Id.*, 354 U.S. at 6.

"The language of Art. III, s 2 manifests that constitutional protections for the individual were designed to restrict the United States Government when it acts outside of this country, as well as here at home." *Reid*, 354 U.S. at 7. "[O]nce a

territory becomes 'incorporated' all of the constitutional protections became 'applicable.'" *Id.* 354 U.S. at 13 n. 26 [citation omitted]. The Court in *Duro* cited *Reid* for its holding that Congress cannot subject American citizens to criminal proceedings before a tribunal that does not provide full constitutional protections. *Duro*, 495 U.S. at 693-94.

One of the constitutional rights the court focused on in *Reid* was the right to trial by jury before a civilian judge and by an independent jury picked from the "common citizenry," a fundamental right in view of the heritage and history of the Constitution and the Bill of Rights. *Id.* 354 U.S. at 9. The Court observed, for example, that the right to trial by jury is twice guaranteed by the Constitution. *Id.*

Moreover, the court traced the fundamental importance of the jury trial to Blackstone who referred to it as "the glory of the English law" and "the most transcendent privilege" because no citizen can be "affected either in his property, or his liberty or his person, but by the unanimous consent of twelve of his neighbors and equals." *Id.* citing 3 *Blackstone's Commentaries* 379 (internal citations omitted). As De Tocqueville observed:

> The institution of the jury ... places the real direction of society in the hands of the governed, or a portion of the governed, and not in that of the government. . . . He who punishes the criminal is . . . the real master of society." *Reid* 354 U.S at 10 n.13, *citing* 1 De Tocqueville, *Democracy in America* (Reeve trans. 1948 ed.), 282-283.

When rejecting one of the precedents urged upon the court in *Reid* as authority to support the trial of civilians in military tribunals, *In Re Ross*, 140 U.S. 453 (1891), the Court observed that the decision in *Ross* had been repudiated. At

issue in *Ross* was the power of an American Consul to try American citizens charged with committing crimes in which the Consuls could and did make criminal laws, initiate charges, arrest alleged defenders, try them and punish them. "Such a blending of executive, legislative, and judicial powers in one person or even in one branch of the Government is ordinarily regarded as the very acme of absolutism." *Reid*, 354 U.S. at 11. As Justice Souter noted in his concurring opinion in *Nevada v. Hicks*:

> **Tribal Courts also differ from other American Courts** (and often from one another) in their structure, in the substantive law they apply, and **in the independence of their judges**. *Id.*, 533 U.S. at 384 (J. Souter concurring) (emphasis added)

Even if Congress has the power to subject non-member Indians to criminal proceedings in tribal courts as a delegation of federal power, an issue we do not directly address, that jurisdiction could not be exercised except according to the Constitution's requirements under *Reid* and *Duro*. [3] Since tribes are not subject to the Bill of Rights and the Fourteenth

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[3] The Respondent Billy Jo Lara acquiesced to the tribal court proceeding without the benefit of counsel in accordance with the federal legislative mandate at issue herein. Denying Mr. Lara the benefit of double jeopardy protection after he was sentenced and punished, as the Petitioner urges, is unfairly harsh under the circumstances. Mr. Lara may well have been successful in asserting both equal protection and due process defenses to this federal delegation of criminal jurisdiction. It is difficult to fault a defendant who was without the benefit of counsel when the absence of counsel is a foreseeable consequence of the *Duro* amendment to the Indian Civil Rights Act, 25 U.S.C. §1301(2). Accordingly, the amicus curiae do not directly address the issue of whether the tribal court prosecution should have been barred by equal protection or by the improper delegation of federal power to the tribal court.

Amendment under *Talton v. Mayes,* 163 U.S. at 382, 385, it necessarily must follow that Congress has no authority to subject Indian non-members to tribal criminal procedures except as a delegation of federal power accompanied by full constitutional protections, which may not be possible.

The ability of Congress to restore inherent tribal sovereignty is not determined merely by federal common law, but instead is limited by this Court's interpretation of fundamental constitutional principles. We turn next to the third source of limitations on inherent tribal sovereignty, namely the rights of American citizens.

C. The Citizenship of the Indian People Operates to Limit the Inherent Power of Tribal Governments Over Non-Members.

The third constitutional basis for the determination that retained tribal inherent sovereignty does not extend to Indians who are not members of the tribe arises from their status as American citizens. *Duro* observed that the historical record must be viewed in light of the status of an Indian as a citizen of the United States. *Id.* 495 U.S. at 692. The initial source of American citizenship for Indians began in the allotment and tribal termination era in the late 1800's,[4] but all tribal members became citizens in 1924.

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[4] Indeed, a unique problem is created for those tribal members who became American citizens under the Dawes Act, 24 Stat. 388-91 (Feb. 8, 1887). Section 6 provides that the "Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." *Id.* Since Section 6 of the Dawes Act also provides full American citizenship to that class of Indians, it is difficult to see how any Indian whose citizenship arose from the Dawes Act could be denied the benefits and burdens, both civil and criminal, of state law. This nearly impossible jurisdictional nightmare could never be sorted out by granting inherent tribal

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided,* That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property. Public Law No. 68-175 (1924), current version at 8 U.S.C. §1401(b).

Nothing in the Indian Citizenship Act of 1924 suggests that Indians are less than full citizens of the United States, and the additional provision in the grant of citizenship quoted above reserved rights to tribal or other property; i.e., **the rights Indian citizens enjoyed as members in their particular tribe** were not impaired or otherwise affected.

The Constitution of the United States makes clear that we have only one class of citizens. *Compare, Saenz v. Roe,* 526 U.S. at 502-504 (each citizen has "an equality of rights with every other citizen,") quoting the *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 112-13 (1872) (J. Bradley dissenting). Indeed, the Framers of the Constitution were concerned that there be no rights of nobility which would of necessity create citizens with an inferior status. *See* Article I, §9 of the Constitution. Of course, the historical record is replete with evidence that the battle for equality was not against nobility, but to secure the principle that all persons are guaranteed the full rights of citizenship. This process was not accomplished, however, without a civil war, post-civil war constitutional amendments, women's suffrage, and the civil rights movement and legislation.

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jurisdiction over some non-member Indians.

Given the painful lessons learned by this process, any suggestion that Indian citizens should somehow be denied full constitutional protections, under any circumstance other than voluntary membership in their own tribe, is inherently suspect.[5] "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000), *quoting Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). The court has justified exceptions to this doctrine for tribes on the theory that "retained tribal authority relates to self-governance." *Rice*, 528 U.S. at 518, explaining the hiring preference allowed by *Morton v. Mancari*, 417 U.S. 535 (1974). Given that "tribes are not mere fungible groups of homogeneous persons" and that non-member Indians enjoy no greater rights in a tribe than non-Indians, the justification for inherent tribal sovereignty, namely voluntary membership in a dependent sovereign, ends with that tribe's members. *Duro*, 495 U.S. at 695.

Whatever plenary power Congress exercises in dealing with Indians as a class, *Duro*, 495 U.S. at 692, Congress simply does not enjoy "plenary power" over American citizens. *Id.*, 495 U.S. at 693. It is at this point that congressional power and tribal jurisdiction collide with the rights of citizens. Tribal

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[5] This Court has twice noted, in both *Duro*, 495 U.S. at 693 and *Hicks*, 533 U.S. at 383-385, (J. Souter concurring) the "special nature" of Indian tribunals. William J. Lawrence, publisher of the Native American Press/Ojibway News (presson@isd.net) and a member of the Red Lake Band of Chippewa Indians in Minnesota, has examined the problematic nature of tribal government in relationship to tribal members. *See*, William J. Lawrence, "In Defense of Indian Rights," *Beyond the Color Line, New Perspectives on Race and Ethnicity in America*, Abigail & Stephan Thernstrom, ed., Hoover Institution Press (2002). Given the concerns about the quality of justice rendered by tribal courts both historically and as a contemporary matter, the Court should be hesitant to permit any extension of inherent tribal sovereignty over Indian non-members.

authority, like all governmental authority, is derived only from the consent of the governed under our constitutional system. *Duro*, 495 U.S. at 694, *citing Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 172-173 (1982) (Stevens, J. dissenting). This constitutional doctrine was enunciated by Justice Matthews in the landmark case of *Yick Wo v. Hopkins*, as follows:

> Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of the government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.

Id., 118 U.S. at 370.

The central feature of the American representative system of government is that the people of the United States are the sovereign, and this Body Politic has the power to create the Constitution that controls the sovereign powers and governmental powers delegated by the people to the federal government. *See*, John R. Tucker, *The Constitution of the United States: A Critical Discussion of its Genesis, Development and Interpretation* (Henry St. George Tucker, ed., Fred B. Rothman & Co. 2000) (1899), Vol. 1, p. 62.

This principle is recognized in the United States Constitution that begins "We the People...." The just powers of government over its citizens are derived only from the consent of the governed, and that consent is conditioned on the right of those citizens to participate in that government through the right of suffrage and by holding elective office. *See, Yick Wo*, "the political franchise of voting" is the "fundamental political right...preservative of all rights." *Id.* 118 U.S. at 370. The Declaration of Independence, in Paragraph 2, established this "self-evident" truth as part of our history and heritage.

This same principle was reaffirmed by the United States Constitution. Being enrolled as an Indian in a federally recognized tribe can only subject an American citizen to the inherent authority of the tribe in which the individual is an enrolled member. It is this voluntary participation in tribal government that is the source of authority which depends on consent. *Duro*, 495 U.S. at 694.[6] There is simply no constitutional basis to distinguish Indians who are citizens of the United States from non-Indians for the purpose of inherent tribal jurisdiction except tribal membership.

It would be anomalous indeed, at a time when our armed forces are deployed in two distant lands for the avowed purpose of instituting democratic governments as the only antidote to terrorism, that we would sanction within our own territorial limits a doctrine that would grant tribal governments inherent power over American citizens, depriving those citizens of both the Bill of Rights and the right to participate in tribal government. As *Duro* observed, as to their internal laws and usages, tribes are left with a broad freedom not enjoyed by any other governmental authority in the United States, reason enough not to expand that power. *Id.* 495 U.S. at 694.

The fundamental promise of the United States Constitution is a representative government with divided governmental powers derived from the consent of the governed. That

[6] *Duro* rejected the suggestion that because non-members reside on reservations, or have ties to the tribe through marriage or employment, there are sufficient "contacts" to furnish a basis for jurisdiction. That argument was "little more than a variation of the [previously rejected] argument that any person who enters an Indian community should be deemed to have given implied consent to tribal criminal jurisdiction over him." *Id.*, 495 U.S. at 695. "Consent of the governed" means more than residence or physical presence, and instead requires the rights of citizenship. *Compare, Id.*, 495 U.S. at 694, explaining how a non-Indian, by adoption into a tribe, could "make himself amenable to their laws and usages," thereby giving consent. *Id.*

constitutional promise to Indians as American citizens cannot be denied by congressional action that purports to recognize inherent tribal criminal jurisdiction over non-members. "Indians like all other citizens share allegiance to the overriding sovereign, the United States." *Duro*, 495 U.S. at 693. The United States, in turn, owes its citizens who are Indians undiminished rights of citizenship. The Constitution does not allow for a society with two classes of citizens, Indian and non-Indian.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Court of Appeals that the amendment to the Indian Civil Rights Act, 25 U.S.C. §1301(2), could not restore inherent tribal criminal jurisdiction over non-member Indians.

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

BILLY JO LARA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF LEWIS COUNTY, IDAHO, MILLE LACS COUNTY, MINNESOTA, AND THURSTON COUNTY, NEBRASKA, *AMICI CURIAE*, IN SUPPORT OF RESPONDENT IN PART

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
1. Lewis County, Idaho	2
2. Mille Lacs County, Minnesota	3
3. Thurston County, Nebraska	3
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE ARGUMENTS OF THE UNITED STATES SHOULD BE REJECTED	5
II. THE ICRA AMENDMENTS CONSTITUTE PRECEDENT FOR ADDITIONAL PROPOSED LEGISLATION THAT WOULD UNDERMINE THE CONSTITUTIONAL RIGHTS OF ALL NON-MEMBERS, INCLUDING NON-INDIANS	8
CONCLUSION	9

TABLE OF AUTHORITIES

CASES — Page

Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001) 5
County of Mille Lacs v. Benjamin, et al., 262 F.Supp.2d 990 (D.Minn. 2003) 3
Dick v. United States, 208 U.S. 340 (1908) 2
Duro v. Reina, 495 U.S. 676 (1990) 2, 5, 9
Fletcher v. Peck, 6 Cranch 87 (1810) 5
In re: Snake River Basin Adjudication, No. 39576 (5th Jud. Dist. County of Twin Falls) (Jan. 21, 2000), *appeal docketed*, Nos. 26042 and 26128 (Idaho Nov. 29, 1999) 2
Means v. Northern Cheyenne Tribal Court, 154 F.3d 941 (9th Cir. 1998) 7
Montana v. United States, 450 U.S. 544 (1981) 5
Nevada v. Hicks, 533 U.S. 353 (2001) 5, 8
Oliphant v. Suquamish Indian Tribe, et al., 435 U.S. 191 (1978) 2, 5, 7
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 5-6
Seminole Tribe v. Florida, 517 U.S. 44 (1996) 6
South Dakota v. Bourland, 508 U.S. 679 (1993) ... 5
State of Nebraska v. Picotte, Case No. FE 99-23 (Thurston County Ct. Apr. 14, 2000) 4
State of Nebraska v. Picotte, Case No. CR 00-6 (Dist. Ct. Thurston County, Aug. 22, 2000) 4
United States v. Enas, 255 F.3d 662 (2001) 6
United States v. Lara, No. 01-3695 (8th Cir., June 24, 2002) 7
United States v. Lara, 324 F.3d 635 (8th Cir. 2003) (*en banc*) 4
United States v. Mille Lac Band of Chippewa Indians, 229 U.S. 498 (1913) 3

TABLE OF AUTHORITIES—Continued

Page

United States v. Weaselhead, 156 F.3d 818 (8th Cir. 1998) 6
United States v. Webb, 219 F.3d 1127 (9th Cir. 2000); *cert. denied* 531 U.S. 1200 (2001) 3
United States v. Wheeler, 435 U.S. 313 (1978) 5

STATUTES and ACTS

25 U.S.C. § 1301 9

MISCELLANEOUS

Motion for Leave to File Brief Out of Time and Brief of the States of New Mexico, South Dakota, and Washington as *Amici Curiae* in Support of Petitioner, *Duro v. Reina*, 495 U.S. 676 (1990) (No. 88-6546) 5
Transcript of Oral Argument, *Oliphant v. Suquamish Indian Tribe, et al.*, 435 U.S. 191 (1978) (No. 76-5729) 7
Brief *Amicus Curiae* of the States of Idaho, Alabama, Louisiana, Nebraska, South Dakota, and Utah Supporting Petitioner in Part, *United States v. Lara*, (No. 03-107) 9
S. 578, 108th Cong. § 13 (2003) 8

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BRIEF OF LEWIS COUNTY, IDAHO, MILLE LACS COUNTY, MINNESOTA, AND THURSTON COUNTY, NEBRASKA, *AMICI CURIAE*, IN SUPPORT OF RESPONDENT IN PART

INTEREST OF *AMICI CURIAE*

The Brief of Lewis County, Idaho, Mille Lacs County, Minnesota, and Thurston County, Nebraska, *Amici Curiae*, in Support of Respondent in Part is submitted pursuant to Sup. Ct. R. 37(4). The interest that prompts the filing of this Brief can be simply stated. Each county contains a substantial amount of land that Indian tribes are now claiming to be within the limits of Indian reservations. For the most part, these lands are owned and populated by non-Indians. Until recently, the jurisdictional history was clear. No one maintained that the original reservations still existed.

Today, armed with tens of millions of dollars in casino profits, Indian tribes are challenging the non-reservation status of these areas and other areas throughout the United States. As a result, any jurisdictional argument that departs from the fundamental principles noted in the decisions of this Court in *Oliphant v. Suquamish Indian Tribe, et al.*, 435 U.S. 191 (1978) and *Duro v. Reina*, 495 U.S. 676 (1990), is of substantial concern to *Amici*. The arguments of the United States in this case are clearly inconsistent with the analysis in *Oliphant* and *Duro*.

1. Lewis County, Idaho. Lewis County, Idaho, is located in north central Idaho. Its geographic boundaries include land which was within the Nez Perce Reservation existing prior to 1894. Today, the original Nez Perce Reservation is a rural area primarily owned and populated by non-Indians. Approximately ninety percent (90%) of the land is owned by non-Indians, and approximately ninety percent (90%) of the population is also non-Indian.

Early on, state and federal cases, including the path marking decision of this Court in *Dick v. United States*, 208 U.S. 340 (1908), were premised upon Nez Perce Reservation disestablishment. However, recent assertions of tribal jurisdiction over non-members and/or claims regarding the lack of state jurisdiction over tribal members have ignored this precedent and caused the issue to surface in the State of Idaho.

In state court, the status of the Nez Perce Reservation is at issue in *In re Snake River Basin Adjudication*, Case No. 39576 (5th Jud. Dist. County of Twin Falls), *appeal docketed*, Nos. 26042 and 26128 (Idaho Nov. 29, 1999). The lower court in the case concluded that the Nez Perce Reservation had been disestablished. *In re SRBA*, Case No. 39576 (Jan. 21, 2000). In federal court, the court of appeals rejected the evidence of this disestablishment, as well as the jurisdictional

history of the area. *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001).

2. Mille Lacs County, Minnesota. Mille Lacs County is a rural county on the south shore of beautiful Lake Mille Lacs in north central Minnesota. The County is approximately twenty (20) miles by fifty (50) miles square. It has a population of approximately 25,000 residents.

In 1855 the Mille Lacs Band shared a 61,000 acre reservation in the northern part of the county that bordered on Lake Mille Lacs. The reservation was subsequently ceded to the United States. Today, the land in the area is at least eighty percent (80%) owned by non-Indians and eighty percent (80%) populated by non-Indians.

In the early 1900's the Mille Lacs Band sued the United States. The Band acknowledged that the reservation no longer existed, but claimed that the consideration promised was never honored. This Court awarded some additional compensation to the Band and recognized that the reservation no longer existed. *United States v. Mille Lacs Band of Chippewa Indians*, 229 U.S. 498, 507-508 (1913). In spite of this venerable 1913 decision, the Mille Lacs Band maintains that the original reservation still exists.

The Band has acted upon their position and continued to pursue recognition of the 1855 reservation boundaries on several fronts. As a result, Mille Lacs County filed a declaratory judgment action in federal district court. The federal district court concluded that a case or controversy was not present. *County of Mille Lacs v. Benjamin*, 262 F.Supp.2d 990 (D.Minn. 2003). That issue has been submitted to the Eighth Circuit Court of Appeals. *County of Mille Lacs v. Benjamin*, Nos. 03-2527 and 03-2537 (8th Cir. argued Oct. 24, 2003).

3. Thurston County, Nebraska. Two reservations were initially established in Thurston County, Nebraska: the

Omaha Indian Reservation and the Winnebago Indian Reservation. This entire area of approximately 250,000 acres is now over seventy-five percent (75%) owned by non-Indians and substantially populated by non-Indians (approximately 50%).

One segment of the Omaha Reservation was sold in 1882. Until recently, the Bureau of Indian Affairs and the Department of the Interior agreed that that area was no longer within the limits of any Indian reservation. Despite this jurisdictional history, the issue was recently raised in *State of Nebraska v. Picotte*, Case No. CR 00-6 (Dist. Ct. Thurston County, Aug. 22, 2000). In that case, the county court and the district court concluded that this reservation area had been disestablished. *State of Nebraska v. Picotte*, Case No. FE 99-23 (Thurston County Ct. Apr. 14, 2000); *State of Nebraska v. Picotte*, Case No. CR 00-6 (Dist. Ct. Thurston County, Aug. 22, 2000). However, the Omaha Tribe has not accepted the result and continues to treat the area in question as if it were within the limits of the Omaha reservation. Significantly, the Tribe does not own any land within this area nor do any of the members of the tribe own land there or reside there.

SUMMARY OF ARGUMENT

At the outset, *Amici* Counties note their agreement with the United States that Congress did not delegate federal prosecutorial authority to the tribes under the ICRA amendments. However, *Amici* Counties support Respondent's position that the Eighth Circuit Court of Appeals correctly held that Congress lacks authority to confer retained inherent authority on Indian tribes. ("[W]e conclude that the distinction between a tribe's inherent and delegated powers is of constitutional magnitude and therefore is a matter ultimately entrusted to the Supreme Court." *United States v. Lara*, 324 F.3d 635, 639 (8th Cir. 2003) (*en banc*)). In this light, *Amici* Counties submit that the principles in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and *Duro v. Reina*, 495 U.S. 676 (1990), control this case.

ARGUMENT

> [T]he restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts *to the right of governing every person within their limits except themselves. Fletcher v. Peck*, 6 Cranch 87, 147 . . .

Oliphant, 435 U.S. at 209 (emphasis as in original).

I. THE ARGUMENTS OF THE UNITED STATES SHOULD BE REJECTED.

The United States has consistently supported expanding tribal jurisdiction over non-members. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (Marshall, J., dissenting) and *Duro v. Reina*, 495 U.S. 676 (1990) (Brennan, J., dissenting). The arguments of the United States were rejected in *Oliphant*, and *Duro*, as well as in a number of other related cases. *Montana v. United States*, 450 U.S. 544 (1981); *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001) and *Nevada v. Hicks*, 533 U.S. 353 (2001); *see also South Dakota v. Bourland*, 508 U.S. 676, 697 (1993) (noting the "Government's litigating position"). Once again, the United States has submitted arguments in this case that are strikingly similar. *See* Motion for Leave to File Brief Out of Time and Brief of the States of New Mexico, South Dakota and Washington as *Amici Curiae* in Support of Petitioner, *Duro v. Reina*, 495 U.S. 676 (1990) (No. 88-6546).

Once again, however, the bright line painstakingly established by this Court in protecting the constitutional rights of non-members in *Oliphant* and *Duro* should be confirmed, and any effort by Congress to undermine those rights is beyond the scope of Congress' authority. *See also United States v. Wheeler*, 435 U.S. 313 (1978); *Santa Clara*

Pueblo v. Martinez, 436 U.S. 49 (1978); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

In this Court, the arguments of the United States generally track the arguments the United States recently submitted in the Eighth Circuit Court of Appeals and in the Ninth Circuit Court of Appeals. The United States was ultimately successful in convincing the latter court in *United States v. Enas*, 255 F.3d 662 (2001), to adopt the position of the United States (as in the past). The judges on the Ninth Circuit's *en banc* panel nevertheless differed in their approach to the issue raised here. *Enas*, 255 F.3d 662, 675 (2001) (Pregerson, J., concurring). In addition, even the opinion of Judge McKeown made clear that the panel majority, unlike the United States, thought it would be "disingenuous to suggest that this question presents a simple answer." *Enas*, 255 F.3d at 674. *Amici* agree that the answer is not simple.

At the end of the day, *Amici* Counties submit that the Eighth Circuit Court of Appeals has the better argument with reference to the validity of the ICRA amendments. As Judge Wollman reasoned in the vacated panel opinion in *United States v. Weaselhead*, 156 F.3d 818 (8th Cir. 1998):

> These post-*Duro* amendments reflect an attempt by Congress to rewrite the fundamental principles upon which *Duro*, *Oliphant*, and *Wheeler* were based by redefining the Indian tribes' "inherent" sovereign status as having always included criminal jurisdiction over nonmember Indians. Thus, we are presented with a legislative enactment purporting to recast history in a manner that alters the Supreme Court's stated understanding of the organizing principles by which the Indian tribes were incorporated into our constitutional system of government.
>
> . . . .

> We conclude that ascertainment of first principles regarding the position of Indian tribes within our constitutional structure of government is a matter ultimately entrusted to the Court and thus beyond the scope of Congress's authority to alter retroactively by legislative fiat. Fundamental, *ab initio* matters of constitutional history should not be committed to "[s]hifting legislative majorities" free to arbitrarily interpret and reorder the organic law as public sentiment veers in one direction or another.

Id. at 823-824. The dissenting opinion in the three-judge panel below found this *Weaselhead* opinion set out the correct analysis. *United States v. Lara*, No. 01-3695 (8th Cir., June 24, 2002) (Hansen, J., dissenting); *see also Means v. Northern Cheyenne Tribal Court*, 154 F.3d 941, 946 (9th Cir. 1998).

In this respect, *Amici* would conclude this argument as Mr. Justice Stewart did in oral argument in *Oliphant*, with what is necessary to decide in this case and what is not. Transcript of Oral Argument at 29, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (No. 76-5729). Here, as in *Oliphant* and *Duro*, we submit the question is whether or not Indian tribes now have the criminal jurisdiction as claimed by the United States. The question is not, if they do not, who does? This Court rejected the jurisdictional void policy argument of the United States in those cases and it should be rejected here.

II. THE ICRA AMENDMENTS CONSTITUTE PRECEDENT FOR ADDITIONAL PROPOSED LEGISLATION THAT WOULD UNDERMINE THE CONSTITUTIONAL RIGHTS OF ALL NON-MEMBERS, INCLUDING NON-INDIANS

In 2003, Senate Bill 578 and House Bill 2242 were introduced in the Congress of the United States as amendments to the Homeland Security Act. Senate Bill 578, is entitled "Tribal Government Amendments to the Homeland

Security Act of 2002." It was introduced in the Senate of the United States by Senator Daniel K. Inouye. It is colloquially referred to as the "Hicks Fix" (referring to *Nevada v. Hicks*, 533 U.S. 353 (2001)).

Section 13 of the bill "affirms and declares that the inherent sovereign authority of an Indian tribal government includes the authority to enforce and adjudicate violations of applicable criminal, civil and regulatory laws committed by any person on land under the jurisdiction of the Indian tribal government, except as expressly and clearly limited by" a treaty or an Act of Congress. Section 13 of said bill further proposes that

> The authority of an Indian tribal government described in [the Bill] shall (1) be concurrent with the authority of the United States; and (2) extend to (A) all places and persons within the Indian country (as defined in Section 1151 of title 18, United States Code) under the concurrent jurisdiction of the United States and the Indian tribal government; and (B) any person, activity, or event having sufficient contacts with that land, or with a member of the Indian tribal government, to ensure protection of due process rights.

S. 578, 108th Cong. § 13 (2003).

To date, Congress has not acted on these bills. The manner in which this Court resolves the present case will undoubtedly be considered in that process. Again, this Court should continue to adhere to the bright line established in *Oliphant* and *Duro*.

Along these lines, *Amici* Counties also agree with the Brief *Amicus Curiae* of the States of Idaho, et al. that the two other constitutional issues regarding whether Congress may subject citizens to the criminal jurisdiction of extra constitutional entities not bound by the Constitution, and whether the ICRA amendments discriminate on the base of ancestry or race, were not raised by Respondent and are inappropriate for

consideration in this matter. As *amicus curiae* Idaho has observed, Respondent has no interest in the ICRA amendments being declared unconstitutional; his double jeopardy claim instead can succeed only if they are construed as a delegation of federal authority. Brief *Amicus Curiae* of the States of Idaho, et al. at 18, n. 6.

CONCLUSION

The judgment of the Court of Appeals should be affirmed to the extent that it rejected the arguments of the United States that the amendments to the Indian Civil Rights Act of 1968, 25 U.S.C. 1301, effected a retroactive legislative reversal of *Duro v. Reina*, 495 U.S. 676 (1990).

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v.

BILLY JO LARA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

Table of Authorities ii
Interest of Amicus Curiae 1
Summary of Argument 1

Argument

I. THE EIGHTH CIRCUIT PROPERLY INTERPRETED 25 U.S.C. § 1301 AS CREATING A DELEGATED FEDERAL POWER RATHER THAN AS A GRANT OF SOVEREIGNTY 6

1. The historical background of the ICRA and plain language of its amendments indicate that Congress did not bestow sovereign power on Indian tribes to prosecute non-member Indians 8
2. Constitutional and congressional silence required this Court to construe the limits of aboriginal sovereignty remaining to Indian tribes 12
3. Appellate courts correctly have construed § 1301 as conferring delegated power due to the practical effect of the statute against the legal background in which it arose 17
4. Construing § 1301(2) as conferring delegated prosecutorial power remedies the jurisdictional gap created by Duro, protects tribal interests in protecting local interests, and does not infringe on any substantial federal interest 23

CONCLUSION 28

TABLE OF AUTHORITIES

CASES: ***Page***

City of Boerne v. Flores, 521 U.S. 507 (1997) 18

Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965) 25

Duro v. Reina, 495 U.S. 676 (1990) ..... *passim*

Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) 22

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 21

Means v. Northern Cheyenne Tribal Court, 154 F.3d 941 (9th Cir. 1998) 17, 18, 19, 20

Nevada v. Hicks, 533 U.S. 353 (2001) 13

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 13, 19, 20

United States v. Enas, 255 F.3d 662 (9th Cir. 2001) 20, 21

United States v. Lara, 324 F.3d 635 (8th Cir. 2003)(en banc) 23

United States v. Weaselhead, 156 F.3d 818 (8th Cir. 1998) .. 19

United States v. Weaselhead,165 F.3d 1209 (8th Cir. 1999) (en banc) 20

United States v. Weaselhead, 36 F.Supp.2d 908 (D.Neb. 1997) 19

United States v. Wheeler, 435 U.S. 313 (1978) 14, 15, 20

CONSTITUTION, STATUTES AND REGULATIONS:

U.S. Const., Art. I, § 8, cl. 3 12
U.S. Const., Art. II, § 2, cl. 2 12
U.S. Const., Art. VI, § 2 12

18 U.S.C. § 13 25
18 U.S.C. § 1152 10
18 U.S.C. § 1153 ..... 10, 27
18 U.S.C. § 1162 ..... 2, 9
18 U.S.C. § 1162(a) 10
18 U.S.C. § 1162(c) 10

25 U.S.C. § 1301 ..... *passim*
25 U.S.C. § 1301(2)(1968) 9
25 U.S.C. § 1301(2)(1990) 16
25 U.S.C. § 1301(4)(1990) 10
25 U.S.C. § 1302 (1968) 9

42 U.S.C. § 1983 14

25 C.F.R. § 11.100 (2003) 25

MISCELLANEOUS:

Indian Civil Rights Act of 1968, Pub. L. 90-284, Title II, § 201, 82 Stats. 77 (Apr. 11, 1968) 8
Public Law 280, ch. 505 §2, 67 Stat. 588 (Aug. 15, 1953) ... 9
Public Law 101-511, Title VIII, § 8077(b), (c), 104 Stat. 1892 (Nov. 5, 1990) 16

INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

NACDL was founded in 1958 to promote criminal-law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal-defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the Double Jeopardy Clause of the Fifth Amendment. In

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[1]Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, Amicus states that no counsel for a party authored any part of this brief, and no person or entity, other than Amicus, its members, and its counsel, made a monetary contribution to the preparation of submission of this brief.

furtherance of this and its other objectives, the NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal-justice issues.

SUMMARY OF ARGUMENT

1. The language of Title 25, United States Code, Section 1301, as amended, does not confer sovereign power, as such grant is not specifically contained in the statute. Rather, the statute confers the power to prosecute, limited to those Tribes that have retained criminal jurisdiction over their own members. The 1990 amendments to the ICRA did not act to repeal Public Law 280, *codified in relevant part*, 18 U.S.C. § 1162, nor did it exempt non-member Indians otherwise covered by Public Law 280 from the ICRA.

Because the language of the amended statute is ambiguous in light of the overall structure of criminal jurisdiction over Indians, and that ambiguity is not resolved by the legislative history, the Eighth Circuit was obliged to read

the statute in a manner consistent with the structure of current and historical Indian criminal jurisdiction.

2. Prior to this Court's decision in Duro v. Reina, 495 U.S. 676 (1990), the Court's common-law holdings established certain limits to sovereign powers retained by the Indian tribes in light of their status as dependent sovereigns. Such rulings were proper given the absence of parameters to aboriginal sovereign powers in either the Constitution or the laws of the United States. The limits established by this Court have been relied upon not only to reach the result in Duro, but also in other cases involving questions of retained aboriginal sovereignty.

Congress did not express any dissatisfaction with such rulings until the Duro opinion. The source of that dissatisfaction stemmed from the gap in prosecutorial authority over misdemeanors created by that decision. In order to remedy that gap, Congress amended Title 25, United States Code,

Section 1301. Such amendments, however, did not constitute a grant of sovereignty.

3. Appellate decisions construing the amendments to Title 25, United States Code, Section 1301, recognize the tension between the practical effects of the language enacted and the legislative intent expressed in passing the amendments. However, such courts largely have relied on settled principles of statutory construction to hold that the amendments conferred delegated power rather than sovereign power. The single case to the contrary, decided by the Ninth Circuit, is incompatible with settled notions of the separation of powers doctrine necessitated by the tri-partite form of our federal government.

Given the grave constitutional questions which would arise under the Ninth Circuit's construction of the amended ICRA, the Government now suggests that the legislative history may be finessed to support an affirmative grant of sovereignty, rather than conferring delegated federal authority. That argument, however, cannot be supported by the language of the

statute. The question is what Congress *has done,* rather than what Congress *can do.*

4. Reading Title 25, United States Code, Section 1301, to delegate authority to the Indian tribes falling within the ICRA to prosecute non-member Indians is a reasonable construction of the amended section. This construction gives meaning to all parts of the amended statute consistent with its practical application. It preserves the parameters established by Public Law 280 as well as the historical practice of having courts which combine both federal and tribal powers in one body. It addresses the ability of the Indian tribes to maintain internal integrity by establishing criminal jurisdiction over misdemeanor offenses committed by non-member Indians within Indian country without affecting the federal government's ability to prosecute major crimes.

As a delegated authority, federal re-prosecution of such misdemeanors, where jeopardy has attached, violates the Fifth Amendment's Double Jeopardy Clause.

ARGUMENT

I.

THE EIGHTH CIRCUIT PROPERLY INTERPRETED 25 U.S.C. § 1301 AS CREATING A DELEGATED FEDERAL POWER RATHER THAN AS A GRANT OF SOVEREIGNTY

The question upon which review was granted by this Court is "Whether Section 1301, as amended, validly restores the Tribes' sovereign power to prosecute members of other Tribes (rather than delegates federal prosecutorial authority to the Tribes), such that a federal prosecution following a tribal prosecution for offenses with the same elements is valid under the Double Jeopardy Clause of the Fifth Amendment." Brief for Petitioner U.S. at (I). The question accepted by the Court for review does not contain any constitutional question other than under the Fifth Amendment's Double Jeopardy Clause.

The United States concedes that the elements of the crimes for which Billy Jo Lara was prosecuted in tribal and federal courts are the same. *See* Brief for Petitioner U.S. at 7

("The government does not dispute that the tribal assault charge and the federal assault charge involved the same elements ..."). The Double Jeopardy question turns on whether the ability of the Tribe to prosecute Mr. Lara derived from its inherent sovereignty, or whether it was exercising power delegated to it by Congress.

NACDL, as amicus curiae, suggests this question may be answered as a matter of statutory construction without the necessity of reaching many of the constitutional questions raised by Petitioner United States and amici in support of Petitioner. Such questions are addressed primarily in the Brief for Petitioner beginning at 23-44 and 39-43. Similarly, Amicus National Congress of American Indians devotes almost half of its brief to whether the amendment of § 1301 was a constitutional exercise of Congress' power to override federal common law created by the decisions of this Court. However, the Double Jeopardy question may be resolved by a

construction of § 1301 that does not implicate the constitutional questions so raised.

1. The historical background of the ICRA and plain language of the amendments indicate that Congress did not bestow sovereign power on Indian tribes to prosecute non-member Indians.

In order to understand the effect of the amendment of section 1301, one must understand the genesis of this statute, alone, as well and in conjunction with other statutory provisions concerning criminal jurisdiction of Indian tribes. Congress enacted the Indian Civil Rights Act of 1968, Pub. L. 90-284, Title II, § 201, 82 Stat. 77 (Apr. 11, 1968)(ICRA), *codified at* 25 U.S.C. § 1301 *et seq*., in order to guarantee to members of the various Tribes and Indian Nations certain rights which previously were not specifically secured to individual enrolled tribal members.

As part of this statutory structure, Congress provided certain definitions, including the definition of an "Indian tribe," "powers of self-government," and "Indian court." *See* 25 U.S.C. § 1301. In defining certain powers of self-government, the Act

originally provided: "'powers of self-government' means and includes all governmental powers possessed by and Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses." 25 U.S.C. § 1301(2)(1968). The ICRA also provided for certain basic protections to individuals in the exercise of Tribal powers of self-government, including some but not all of the rights set forth in the Bill of Rights of the United States Constitution. *See* 25 U.S.C. § 1302 (1968). Nowhere in the ICRA itself did Congress address any question of inherent Tribal sovereignty to conduct criminal prosecutions.

The ICRA may not have addressed such a question as, at the time the ICRA was passed, Congress had already enacted Public Law 280, ch. 505 §2, 67 Stat. 588 (Aug. 15, 1953), *codified at* 18 U.S.C. § 1162. Public Law 280 explicitly divested certain Tribes of all criminal jurisdiction and invested the power to prosecute crimes committed by or against Indians in specified areas of Indian country to certain States or

Territories. It also provided that the criminal laws of such State or Territory would have the same force and effect within such Indian country as they have elsewhere within the State or Territory. Finally, Public Law 280 provided that the Indian Major Crimes Act, codified at 18 U.S.C. §§ 1152 and 1153, would not apply in the listed areas. *See* 18 U.S.C. § 1162(a),(c).

Nothing in the ICRA, as enacted in 1968, purported to alter the inherent sovereign right to prosecute criminal acts within Indian country that Public Law 280 divested from the Tribes falling within the listed areas. The amendments to the ICRA added the following: **"(4)** 'Indian' means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153 of Title 18 if that person were to commit an offense listed in that section in Indian country to which that section applies." 25 U.S.C. § 1301(4)(1990).

Arguably, this section addresses the problem created by Public Law 280 and acts to preserve Congress' having divested certain Indian tribes of all criminal jurisdiction. However, the

language of the ICRA amendment refers to individuals, rather than to Indian tribes as a class, or even a sub-class. Construed as a matter of sovereignty, this section would create a class of enrolled Indians who would be outside of the definition of "all Indians" contained in § 1301(2), and therefore could not be prosecuted as non-member Indians under that section even if they committed a misdemeanor within the territory of an Indian tribe which exercises criminal jurisdiction.

The statutory language is less than a model of clarity as to what power Congress actually conferred by the ICRA amendments. Again, "sovereign" does not appear anywhere in that language. Consistent with the ICRA's purpose of conferring certain constitutional rights on those already subject to criminal prosecution by Indian tribes, it is logical to construe § 1301(4)'s provisions to guarantee those same rights to non-member Indians who may be prosecuted by a tribe not covered by Public Law 280.

2. Constitutional and congressional silence required this Court to construe the limits of aboriginal sovereignty remaining to Indian tribes.

Against the background of both the original ICRA, as well as Public Law 280 (and indeed, the whole relationship between the various Tribes and the United States Government since the inception of our country), this Court was called upon to construe the limits of aboriginal Tribal sovereign authority to prosecute classes of people. Such aboriginal sovereignty is implicit in the Indian Commerce Clause, U.S.Const., Art. I, § 8, cl. 3, as well as the Treaty Clauses, U.S.Const., Art. II, §2, cl. 2; Art. VI, §2. However, neither these constitutional provisions nor any Act of Congress specifically define the scope and limits of aboriginal sovereignty retained by the Indian tribes; that task has fallen to the Court. The most recent of this Court's cases with respect to criminal sovereign jurisdiction are the ones most relevant to the current discussion.

The first case to challenge Indian tribal criminal jurisdiction based on a lack of sovereign power arose in

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). In that case, the Court held that a tribe had no inherent power to prosecute non-Indian residents of its reservation. The Court reasoned that "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." Id., at 210. Although not specifically mentioned, certain Tribes had been divested of their power to prosecute anyone, member or non-member alike, by Public Law 280. Tribes still do not possess such power over non-Indians, as Congress has never seen fit to establish a manner in which it would be acceptable for Tribes to prosecute non-Indians.

This Court has relied on its holding in Oliphant to determine, in other contexts, that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Nevada v. Hicks, 533 U.S. 353, 358-59 (2001)(construing authority of tribal court to adjudicate tort

claims or civil rights claims under 42 U.S.C. § 1983 based on state officials' execution of warrants on allotted land within reservation). Congress has taken no action to alter this continuing interpretation of the limited scope of the aboriginal sovereign power of an Indian tribe.

The second case to raise the question of the extent of tribal sovereign power arose in United States v. Wheeler, 435 U.S. 313 (1978). In that case, a tribal member challenged his prosecution in federal court under the Double Jeopardy Clause after having been convicted of a lesser included offense in the court of his Tribe. Wheeler argued that because Congress has plenary authority to abrogate tribal sovereignty (as it had via Public Law 280 and other enactments), the tribe derived whatever power it retained from the federal government. It therefore exercised delegated power, rather than the power of a separate sovereign. The Court rejected this argument and found that among the "unique and limited" sovereign powers retained

by the tribe was the power to punish "members of the Tribe for violations of tribal law." Id., at 323-24.

In so holding, the Wheeler Court specifically noted that the distinction was not one of racial status (which would be a constitutionally impermissible basis for drawing such distinction), but rather an Indian's membership status. "The areas in which ... implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." Id., at 326. As Wheeler was a member of the Tribe which prosecuted him, that was an act of a separate sovereign, and the Double Jeopardy Clause did not prohibit his re-prosecution by the federal government. *See* id., at 332. Despite the Court's clear statement as to the limits of Indian tribal sovereignty, Congress took no action to alter the scope of that inherent authority.

Congress did not act until after this Court's decision in Duro v. Reina, 495 U.S. 676 (1990). It is true that Congress acted precipitously thereafter, clearly motivated by the concern

expressed by a number of Indian tribes as to the possibility that no sovereign had the authority to prosecute non-member Indians for misdemeanor crimes committed within Indian country.

In Duro, the Court read its prior decisions as meaning that an Indian tribe did not have independent sovereign authority to prosecute an Indian who was not a member of its Tribe (also known as a "non-member Indian"). In reaction to this decision, Congress amended the ICRA. *See* Pub. L. 101-511, Title VIII, § 8077(b), (c), 104 Stat. 1892 (Nov. 5, 1990). This amendment altered the definition of the "powers of self-government" as including "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2)(1990). Although the amendment was couched in terms of "inherent power," it did not specifically confer "sovereign power." Sovereign power need not have been created to remedy the

jurisdictional gap logically created by the Indian tribes' position as dependent sovereigns.

3. Appellate courts correctly have construed § 1301 as conferring delegated power due to the practical effect of the statute against the legal background in which it arose.

Courts have been wrestling with the exact meaning and effect of this amendment since it was enacted. The Ninth Circuit first addressed whether the amendment could be given retroactive effect in Means v. Northern Cheyenne Tribal Court, 154 F.3d 941 (9th Cir. 1998). In that case, a non-member Indian filed for a writ of habeas corpus, challenging the power of the Tribe to prosecute him for violations of the Tribal code which occurred between 1978-1988. In granting the writ, the Ninth Circuit found that the Ex Post Facto clause proscribed the prosecution, as at the time of the offenses the Tribe did not have jurisdiction to punish such offenses.

In so holding, the Means court relied on the Duro decision which held that tribes do not have jurisdiction over non-member Indians. *See* id., at 944. Tribes only obtained

jurisdiction to prosecute after Congress amended the ICRA in 1990. "Thus the amendments to the ICRA did constitute a change in the existing law." Id.

The Means court recognized the tension created by the amendment with regard to whether the power to prosecute was delegated federal power, or inherent tribal sovereign power:

> While the legislative history of [the 1990 amendments] suggests that Congress did not intend to *delegate* ... to the tribes [the authority to prosecute non-member Indians], that is essentially the amendment's effect. While Congress is always free to amend laws it believes the Supreme Court has misinterpreted, it cannot somehow erase the fact that the Court did interpret the prior law.

Means, 154 F.3d at 945 (italics in original). In other words, Congress has the power to change a law if it disagrees with the manner in which this Court has construed it,[2] but does not have the power to say that the Court did not construe the law

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[2]This is, of course, subject to the limits of the Constitution. *See* City of Boerne v. Flores, 521 U.S. 507 (1997)(holding that the FRFA exceeded congressional enforcement powers under § 5 as being inconsistent with the scope of constitutional rights and limitations as established by the decisions of the Court).

correctly. The Circuit reasoned that Congress could not, consistent with a separation of powers, say that the Indian tribes always had inherent sovereign authority to prosecute non-member Indians. *See* id.

At about the same time that the Ninth Circuit was deciding the Ex Post Facto implications of the amended ICRA, the Eighth Circuit wrestled with the question of whether the conferral of authority by Congress was one of delegated or sovereign power. In United States v. Weaselhead, 156 F.3d 818 (8th Cir. 1998), the Eighth Circuit construed the ICRA amendments in a case in which a non-member Indian was challenging a federal prosecution on the basis that Double Jeopardy barred such prosecution due to a prior tribal conviction for the same offense.

In Weaselhead, the district court had held that Duro and Oliphant were federal common law decisions within the ultimate authority of Congress to overrule. 36 F.Supp.2d 908, 914-15 (D.Neb. 1997). A divided panel of the Eighth Circuit

reversed, finding that the authority to ascertain the position of Indian tribes within our constitutional structure was a matter of constitutional law (much like the separation of powers doctrine) "ultimately entrusted to the Court and thus beyond the scope of Congress's authority to alter retroactively by legislative fiat." 156 F.3d at 824. The idea that the amendment could not be given retroactive effect was consistent with the Ninth Circuit's decision in Means, supra. In the end, however, the district court's decision was affirmed by dint of an evenly divided *en banc* court. 165 F.3d 1209 (8th Cir. 1999).

The Ninth Circuit issued the next decision in this continuing effort to resolve what, exactly, the ICRA amendment means with respect to the issue of Double Jeopardy. In United States v. Enas, 255 F.3d 662 (9th Cir. 2001), the appellate court disavowed its decision in Means indicating that Congress cannot overrule the Supreme Court's interpretation of *common law* precepts. The circuit found the decisions in Oliphant, Wheeler, and Duro to be based neither on the Constitution nor

on the statutes of the United States, but that such decisions constituted federal common law. Because in the area of common law Congress reigns supreme, reasoned the Enas court, Congress did have the power to retroactively interpret scope of inherent sovereign power continuously possessed by the tribes. See Enas, 255 F.3d at 673-75.

The Ninth Circuit reasoned that the proposition announced in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)("It is emphatically the province and duty of the judiciary to say what the law is") simply does not apply to common law precepts. Therefore, even though federal common law fills in where Congress and the Constitution have not acted, Congress can always come along and change a judicial statement of what the law is *and was at the time of decision* by means of legislative fiat. Enas, 255 F.3d at 675.

Respectfully stated, such cannot be consistent with the holding in Marbury v. Madison. It is not only the prerogative for this Court to say what the law is, but also necessary to the

independence of the judicial branch to have finality to its decisions. Under the separation of powers doctrine, "neither the secretary at war, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court." Hayburns's Case, 2 U.S. (2 Dall.) 409 (1792).

Given the breathtaking repercussions such a decision would have on the balance of powers established by the Constitution, Petitioner United States does not espouse this position. Rather, it speaks of the ICRA amendment not as having *overruled* Duro, but as having conferred sovereign power where it previously did not exist. See Brief of Petitioner U.S. at 23-26 (arguing that Congress exercised its plenary authority over Indian tribes to restore sovereign authority through the ICRA amendments).

Congress may have such power. The question remains as to whether Congress exercised such power. The language of

the ICRA amendments, as discussed in Part 1, *supra*, does not support such a broad reading.

Statutory construction was the fundamental basis of the Eighth Circuit's decision:

> [T]he ICRA amendments cannot have the effect that they plainly sought to achieve: a retroactive legislative reversal of *Duro*. We need not construe the ICRA amendments as a legal nullity, however. It is apparent that Congress wished to allow tribes to exercise criminal misdemeanor jurisdiction over nonmember Indians. ... Nothing in our decision today in any way circumscribes the jurisdiction so conferred.

United States v. Lara, 324 F.3d 635, 640 (8th Cir. 2003)(en banc)(internal citation omitted). This holding is consistent with the statutory framework, case law, and the history of the federal government's sharing of prosecutorial power with the Indian tribes.

4. Construing § 1301(2) as conferring delegated prosecutorial power remedies the jurisdictional gap created by Duro, protects tribal interests in protecting local interests, and does not infringe on any substantial federal interest.

Construing the language actually used to confer delegated federal authority to prosecute non-member Indians in

tribal courts is reasonable in light of both the practical limits of the amendment, given Public Law 280, as well as with the problem of the "jurisdictional gap" created by the Duro opinion. As noted by Amici States of Washington, Arizona, California, Colorado, Michigan, Montana, New Mexico, and Oregon, the most common types of criminal activity reported on the reservations are disorderly conduct, assault battery, intoxication, and driving while intoxicated. *See* Br. for Amici States at 5. The concern of the States is that "Should this Court determine that Congress' effort to restore inherent sovereignty over non-member Indians is invalid, it will reopen a jurisdictional gap, where no government will have jurisdiction over misdemeanors committed by non-member Indians in Indian country." Id. at 7.

First, that the federal government *could* exercise misdemeanor jurisdiction within Indian country is not in doubt. Federal prosecutions may be brought against non-Indians in Indian country under the Assimilated Crimes Act, *codified at* 18

U.S.C. § 13 (1996). Such prosecutions also may be brought against Indians and non-Indians alike for misdemeanors committed on other federal reservations, such as military bases and national park lands. The problem with such prosecutions is that they may burden federal prosecutors as well as federal courts.

Similarly, there is no doubt that tribal courts may exercise delegated authority, as well as aboriginal sovereign authority, and traditionally have done so. Such courts are known as Courts of Indian Offenses. As noted in the brief of Amici Curiae Eighteen American Indian Tribes, "Courts of Indian Offenses were mainly instruments of the BIA [Bureau of Indian Affairs], but included inherent tribal power." Id. at 14, *citing* Colliflower v. Garland, 342 F.2d 369, 379 (9th Cir. 1965). As noted by Amici, not only have these courts been upheld since 1888, but approximately 45 tribes still have such courts. *See* Br. for Amici Curiae Eighteen American Indian Tribes at 14 n. 12; 25 C.F.R. § 11.100 (2003).

Construing the ICRA, as amended, as conferring delegated criminal prosecutorial authority is consistent with prior practices regarding Courts of Indian Offenses. Such courts pre-dated the ICRA and were the product of the Bureau of Indian Affairs, which Congress authorized to employ both Indian police and Indian judges. Conferring federal prosecutorial power to tribal court systems, which would then operate in the nature of shared jurisdiction traditionally enjoyed by Courts of Indian Offenses, would be an adequate remedy for the jurisdictional "gap" created by the Duro decision. It also adequately protects federal interests in such prosecutions.

For instance, the tribal officer assaulted by Mr. Lara qualifies as a federal officer because he is funded by the BIA. This officer is also a member of the Spirit Lake Nation and enforces the laws of that Nation. The tribe has the same interest in protecting its officers as does the federal government, the officers being physically one and the same. The tribe also has the same prosecutorial power of the federal government to

address this offense: misdemeanor jurisdiction. For more severe crimes, the federal government exercises jurisdiction pursuant to the Major Crimes Act, 18 U.S.C. § 1153. According to Amici States, the Duro decision did not create a problem with the prosecution of major crimes, but rather only affected the prosecution of minor crimes. That problem has been alleviated by the amendments to § 1301.

The decision of the Eighth Circuit in affirming the grant of delegated power to prosecute misdemeanor crimes committed by non-member Indians in tribal courts therefore addresses the problem presented to Congress by Duro. It is consistent with Congress' duty to provide for the protection of the tribes. It follows the actual language used by Congress to accomplish that goal. Finally, it avoids a number of constitutional questions which otherwise would arise should congressional statements regarding a retroactive "overruling" of this Court's Duro decision be given effect, as it was in the Enas decision. Because the Eighth Circuit's decision is a reasonable

interpretation supported by the language, structure, and history of the ICRA, such decision should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should hold that Respondent's prosecution by the Spirit Lake Tribe was as a matter of delegated federal authority, and that Petitioner's subsequent prosecution in the United States District Court for the District of North Dakota violated his Fifth Amendment right against twice being placed in jeopardy for the same offense.

Dated: December 15, 2003

RESPECTFULLY SUBMITTED.

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No. 03-107

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY JO LARA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

	Page
I. Respondent cannot justify construing the post-*Duro* amendment as anything other than a restoration of tribal sovereign power	3
II. Respondent does not identify anything in the Constitution that prevented Congress from restoring Tribes' sovereign power to prosecute non-member Indians	7
III. Respondent cannot justify treating his tribal prosecution, if beyond the jurisdiction of the Tribe, as a double jeopardy bar to his federal prosecution	17

TABLE OF AUTHORITIES

Cases:

Argersinger v. *Hamlin*, 407 U.S. 25 (1972)	15
Blatchford v. *Native Village*, 501 U.S. 775 (1991)	8
Dawavendewa v. *Salt River Project Agric. Improvement Dist.*, 154 F.3d 1117 (9th Cir. 1998), cert. denied, 528 U.S. 1098 (2000)	13
Duro v. *Reina*, 495 U.S. 676 (1990)	1, 7-8, 10, 11, 12, 14, 16
Fisher v. *District Court*, 424 U.S. 382 (1976)	6
Holloway v. *United States*, 526 U.S. 1 (1999)	5
Inyo County v. *Paiute-Shoshone Indians*, 538 U.S. 701 (2003)	6-7
Kiowa Tribe v. *Manufacturing Techs., Inc.*, 523 U.S. 751 (1998)	8
Montana v. *United States*, 450 U.S. 544 (1981)	9
Morris v. *Tanner*, No. 99-36007, 2001 WL 832722 (9th Cir. July 24, 2001), on remand, 288 F. Supp. 2d 1133 (D. Mont. 2003)	18
Nevada v. *Hicks*, 533 U.S. 353 (2001)	9
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978)	11
Reid v. *Covert*, 354 U.S. 1 (1957)	16

Cases—Continued: Page

Reiter v. *Sonotone Corp.*, 442 U.S. 330 (1979) 9
Rodriquez v. *United States*, 480 U.S. 522 (1987) 5
South Dakota v. *Bourland*, 508 U.S. 679 (1993) 9
Talton v. *Mayes*, 163 U.S. 376 (1896) 10
United States v. *Rogers*, 45 U.S. (4 How.) 567 (1846) 10, 11
United States v. *Salerno*, 481 U.S. 739 (1987) 14, 15
United States v. *Turkette*, 452 U.S. 576 (1981) 5
United States v. *Wheeler*, 435 U.S. 313 (1978) 9

Constitution, treaty and statutes:

U.S. Const.:
Art. I, § 10, Cl. 1 8
Amend. V 5
Amend. VI 14, 15
Amend. XIV 14
Treaty Between the United States and the Sisseeton and Wahpaton Bands of the Dakota or Sioux Tribe of Indians, June 19, 1858, Art. VI, 12 Stat. 1039 4
Act of Mar. 3, 1817, ch. 92, § 2, 3 Stat. 383 10
Act of June 30, 1834, ch. 161, § 25, 4 Stat. 733 10
Act of June 2, 1924, ch. 223, 43 Stat. 252 7
Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. No. 99-570, Title IV, § 4217, 100 Stat. 3207-146 15
Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.* 2
25 U.S.C. 1301(2) 1, 2, 3, 5, 6, 8, 13, 17, 18
25 U.S.C. 1302(7) 6, 15
25 U.S.C. 1302(8) 15
25 U.S.C. 1303 15
18 U.S.C. 1152 10
18 U.S.C. 3585(b) 18
25 U.S.C. 450j(h) 13
42 U.S.C. 2000e-2(i) 13

Miscellaneous: Page

Felix Cohen, *Handbook of Federal Indian Law* (1942) 11
137 Cong. Rec. 10,712-10,714 (1991) 4
Crimes Committed by Indians, 17 Op. Att'y Gen. 566 (1883) 11
H.R. Conf. Rep. No. 261, 102d Cong., 1st Sess. (1991) 4
H.R. Rep. No. 61, 102d Cong., 1st Sess. (1991) 4
Jurisdiction of the Court of the Choctaw Nation, 7 Op. Att'y Gen. 174 (1855) 11
1 Op. Sol. Dep't of Interior 445 (1934) 11-12

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Respondent does not dispute that the text of 25 U.S.C. 1301(2), as amended in response to *Duro* v. *Reina*, 495 U.S. 676 (1990), can be read *only* as a restoration of Indian Tribes' own sovereign power to prosecute members of other Tribes. Although respondent urges the Court to uphold Section 1301(2) as a delegation of federal power—and further argues that the Spirit Lake Nation's exercise of that power creates a double jeopardy bar to the United States' prosecution in this case—an Act of Congress cannot be construed contrary to its express terms, even to save it from asserted constitutional invalidity.

Moreover, respondent does not provide any reason seriously to question Congress's constitutional authority to enact the post-*Duro* amendment to Section

1301(2). He does not, and cannot, identify any provision of the Constitution that addresses the extent to which Tribes may continue to exercise sovereign powers after their incorporation into the United States. This Court has recognized that Congress, in the exercise of its plenary authority over Indian affairs, may determine the scope of tribal power. In the exercise of that authority, Congress may modify or repeal limits on a Tribe's power within its own reservation that had previously been imposed by Act of Congress or treaty, or that had been recognized by this Court as a matter of federal common law against the backdrop of federal laws and treaties. The result is the same as when Congress, in Public Law 280, lifted the limitation under federal law on the exercise of jurisdiction by certain *States* on Indian reservations and authorized those States to exercise their own sovereign powers to bring prosecutions in cases involving Indians.

The fact that tribal members are United States citizens does not, as respondent asserts, prevent Congress from affording them a special status with distinct attributes, such as being subject to prosecution by another Tribe for an offense committed on that Tribe's reservation. The Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.*, requires that defendants in tribal court be accorded most of the protections that the Constitution extends to defendants in state and federal court, and provides for federal habeas review of tribal court convictions. The mere possibility that a defendant in a particular case might be denied a protection in a tribal prosecution that the Indian Civil Rights Act or the Constitution might require does not provide any basis for invalidating Section 1301(2) on its face. In such a case, the defendant may pursue a federal habeas action to challenge the legality of his conviction.

Even if the Court were to hold that Section 1301(2) exceeds Congress's authority under the Constitution, that would not call respondent's federal prosecution into question. It would mean only that respondent's earlier tribal prosecution was beyond the jurisdiction of the Spirit Lake Nation, because Section 1301(2) did not validly restore the Nation's sovereign power to prosecute non-member Indians. Whether or not the tribal prosecution was valid, it was conducted by a sovereign separate from the United States, and thus cannot operate as a double jeopardy bar to the federal prosecution in this case.

I. RESPONDENT CANNOT JUSTIFY CONSTRUING THE POST-*DURO* AMENDMENT AS ANYTHING OTHER THAN A RESTORATION OF TRIBAL SOVEREIGN POWER

Section 1301(2), as amended after *Duro*, states that Tribes' "powers of self-government" include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). Respondent essentially concedes that Section 1301(2), by its express terms, authorizes Tribes to exercise *only* their own sovereign power, *not* delegated power of the federal government itself, to prosecute crimes committed on their reservations by members of other Tribes. See, *e.g.*, Resp. Br. 24 ("Congress believed it could 'restore' tribal sovereignty and overrule the Court's holding in *Duro*."). Section 1301(2)'s textual recognition of such criminal jurisdiction exclusively as an "inherent power of Indian Tribes" and a "power[] of *self*-government" permits no other construction.[1]

[1] According to respondent, regardless of the implications of the post-*Duro* amendment for other Tribes, the amendment cannot

That conclusion is confirmed by the legislative record, which makes clear that the post-*Duro* amendment "is not a delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations." H.R. Conf. Rep. No. 261, 102d Cong., 1st Sess. 3-4 (1991); see, *e.g.*, H.R. Rep. No. 61, 102d Cong., 1st Sess 7 (1991) (stating that the amendment "is not a federal delegation"); 137 Cong. Rec. 10,712-10,714 (1991) (statement of House floor manager) (explaining that the amendment "recognizes an inherent tribal right which always existed," and "is not a delegation"); see also U.S. Br. 18-19. Respondent does not dispute

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restore criminal jurisdiction to the Spirit Lake Nation, which he contends relinquished that jurisdiction in an 1858 Treaty. See Resp Br. 8-9 n.3; see also Br. of Amici States of Washington, et al., 12-14. In the relevant Article of that Treaty, the signatory bands agreed "not to engage in hostilities with the Indians of any other tribe, unless in self-defence, but to submit, through their agent, all matters of dispute and difficulty between themselves and other Indians for the decision of the President of the United States,/and to acquiesce in and abide thereby." Treaty Between the United States and the Sisseeton and Wahpaton Bands of the Dakota or Sioux Tribe of Indians, June 19, 1858, Art. VI, 12 Stat. 1039. That provision is most naturally read as referring to disputes between Tribes *qua* Tribes—hence the provision for referral of the dispute to the President to act on behalf of the United States to mediate between sovereign Tribes—not as referring to prosecution by one Tribe of an individual member of another Tribe who commits a crime on the first Tribe's reservation. And, even if the provision could be read otherwise, such prosecutions could be viewed as falling within the "self-defence" exception, because they protect against threats (such as respondent's assault on a police officer) against the security of the Tribe, its members, and the entire reservation community. Of course, just as Congress can restore criminal jurisdiction that had been lost by Tribes' dependent status alone, Congress can restore criminal jurisdiction lost by treaty.

that such statements accurately and authoritatively reflect the intent of Congress as a whole.

Respondent nonetheless contends that Section 1301(2) may be construed as a delegation of federal power—and should be so construed if it is held invalid, as he urges, as a restoration of tribal power. Respondent makes no attempt to reconcile his "saving" construction with Section 1301(2)'s text and legislative history.[2] Respondent asserts only that such a construction would comport with "the spirit of Congress's intent" that Tribes be able to prosecute members of other Tribes. Resp. Br. 23-24. But "the language of the statutes that Congress enacts provides 'the most reliable evidence of its intent,'" *Holloway* v. *United States*, 526 U.S. 1, 6 (1999) (quoting *United States* v. *Turkette*, 452 U.S. 576, 593 (1981)), and the language of Section 1301(2) negates any suggestion that Congress intended to permit Tribes to prosecute non-member Indians in the exercise of a delegated power of the federal government. As this Court has stated, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law," *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987) (per curiam), when the statutory language and legislative history direct otherwise.

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[2] Respondent suggests that there might be Fifth Amendment due process concerns even if Section 1301(2) were construed as a delegation of federal power. See Resp. Br. 24-25 n.10; but see U.S. Br. 34-43; cf. Br. of Amici National Congress of American Indians 24-29. Whatever the merits of the constitutional concerns identified by respondent and amici with respect to a statute that, contrary to Section 1301(2), actually purported to delegate federal power to Tribes, they suggest that construing Section 1301(2) as a delegation would not, as the court of appeals seemed to believe, avoid constitutional questions entirely.

Construing Section 1301(2) as a delegation of federal power would not, in any event, necessarily advance its primary objectives. See U.S. Br. 19-21, 36-38 (discussing objectives). It would not promote "the congressional policy of Indian self government," *Fisher* v. *District Court*, 424 U.S. 382, 390-391 (1976) (per curiam), if tribal prosecutors and tribal courts were to be treated as mere agents of the United States for the prosecution of non-member Indians. It also would not promote "Congress's desire to maintain and defend order on the reservations" (Resp. Br. 24) if a tribal prosecution of a non-member Indian could operate as a double jeopardy bar to a subsequent federal prosecution for an offense with the same elements, including a greater-encompassing offense. That would pose the risk that non-member Indians who commit serious crimes on the reservation could avoid serving any more than the one-year term of imprisonment that Tribes are authorized to impose for any offense. See 25 U.S.C. 1302(7).[3]

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[3] Respondent contends that construing Section 1301(2) as a delegation of federal power would serve the salutary purposes of encouraging communication between tribal and federal prosecutors. See Resp. Br. 4, 31-32. That provides no reason to construe Section 1301(2) contrary to its plain language. Nor does the legislative record suggest that encouraging such communication was among Congress's purposes in enacting the provision. Indeed, Congress would not have wanted to prevent tribal authorities from commencing prosecutions as promptly as they believed appropriate, so as to enhance the effectiveness of tribal law enforcement for punishing offenders and vindicating the interests of the reservation community. Tribal and federal prosecutors engage in extensive ongoing communication and cooperation—and have ample incentive to do so—without the necessity for tribal prosecutors to be treated as agents of the United States for the prosecution of non-member Indians. See, *e.g.*, U.S. Br. at 26, *Inyo*

II. RESPONDENT DOES NOT IDENTIFY ANYTHING IN THE CONSTITUTION THAT PREVENTED CONGRESS FROM RESTORING TRIBES' SOVEREIGN POWER TO PROSECUTE NON-MEMBER INDIANS

A. Although respondent asserts that "[t]he essential issue" in this case is "whether this Court or Congress has the superior power to determine and define the constitutional limits of tribal sovereignty" (Resp. Br. 6), that assertion rests on the erroneous premise that the Constitution dictates whether or not an Indian Tribe may exercise its sovereign power to prosecute an Indian who is a member of another Tribe. No provision of the Constitution addresses that question, and respondent does not attempt to identify one. Nor does respondent refute the extensive historical evidence that Tribes were recognized to retain that power well after the Constitution's ratification—evidence incompatible with respondent's position that something in the Constitution itself circumscribes the scope of retained tribal sovereign powers. See U.S. Br. 28-31 & n.11.[4]

County v. *Paiute-Shoshone Indians*, 538 U.S. 701 (2003) (No. 02-281). Even with the best of intentions and the best of procedures, however, communication is not always assured of being effective and timely, so that a tribal prosecution could occur before a decision had been made whether to pursue a federal prosecution.

[4] Respondent asserts that the historical record is irrelevant because much of it predates Congress's comprehensive grant of United States citizenship to Indians in 1924. See Resp. Br. 18; Act of June 2, 1924, ch. 233, 43 Stat. 253; cf. *Duro*, 495 U.S. at 692 (noting that "[m]any Indians" became United States citizens before that time). Whatever the implications of that statutory grant for individual Indians' relationship to the United States and the States, it cannot be conceived of as triggering some extra-

The error in respondent's position is illustrated by his attempt to analogize the Constitution's treatment of States to its treatment of Tribes. See Resp. Br. 18-19. For example, respondent suggests that, just as "under the Constitution, states may not make treaties with foreign nations," Tribes may not prosecute members of other Tribes. *Id.* at 19. But the Constitution expressly provides that "[n]o State shall enter into any Treaty, Alliance, or Confederation," U.S. Const. Art. I, § 10, Cl. 1, and imposes other explicit textual constraints on States' exercise of sovereign powers. No remotely analogous provision purports to restrict Tribes' prosecutorial power. Cf. *Kiowa Tribe* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 755 (1998) ("[T]ribes were not at the Constitutional Convention."); *Blatchford* v. *Native Village*, 501 U.S. 775, 781-782 (1991). In particular here, there is nothing in the Constitution that affirmatively precludes an Indian Tribe from exercising jurisdiction on its reservation over a member of another Tribe, and Section 1301(2)'s recognition of that power as between Tribes falls well within Congress's plenary power over Indian affairs.

Contrary to respondent's assertions, this Court's decisions, including *Duro*, support the conclusion that the scope of tribal powers is not unalterably fixed by the Constitution, but instead is subject to adjustment by Congress. While respondent seeks support from cases holding that Tribes' dependent status precluded their assertion of a sovereign power as against non-members (Resp. Br. 12-15), those are cases in which no Act of Congress or other positive law authorized Tribes to exercise that power. In several such cases, the Court

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textual constitutional limitation on the powers of tribal governments. See p. 13-14, *infra*.

made clear that Congress could authorize the exercise of the "tribal power" at issue. *Montana* v. *United States*, 450 U.S. 544, 564 (1981); see, *e.g.*, *Nevada* v. *Hicks*, 533 U.S. 353, 358-359 (2001); *South Dakota* v. *Bourland*, 508 U.S. 679, 695 (1993). When Tribes regulate the activities of non-members pursuant to authorization from Congress itself, Tribes are not "*independently* * * * determin[ing] their external relations," and thus are not unilaterally acting in a manner "necessarily inconsistent" with their "dependent status." *Montana*, 450 U.S. at 564 (emphases added and deleted) (quoting *United States* v. *Wheeler*, 435 U.S. 313, 326 (1978)).

For reasons previously explained, the Court's use of variants of the word "delegate" to refer to such authorization does not, as respondent assumes (*e.g.*, Resp. Br. 13-15), signify that Congress may not restore Tribes' sovereign powers, but may only delegate to Tribes powers that must be regarded as those of the Federal Government. See U.S. Br. 25-26; see also *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979) ("[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute."). Nothing in those cases turned on whether Congress could authorize an exercise of tribal power as distinguished from federal power. Cf. *Wheeler*, 435 U.S. at 328 n.28 (noting the undecided question whether a Tribe "would necessarily be an arm of the Federal Government" if it exercised criminal jurisdiction that it lost and then "regained * * * by Act of Congress"). Indeed, in a decision cited in the very section of *Duro* on which respondent principally relies (*e.g.*, Resp. Br. 16-17), the Court explained that "the existence of the right in Congress to regulate the manner in which the local powers of [a Tribe] shall be exercised does not

render such local powers Federal powers." *Talton* v. *Mayes*, 163 U.S. 376, 384 (1896) (cited in *Duro*, 495 U.S. at 693).

B. *Duro* is illustrative of this Court's approach to challenges to a Tribe's exercise of a sovereign power in the absence of congressional authorization. In *Duro*, the Court did not identify any provision of the Constitution as compelling its holding that, "[i]n the area of criminal enforcement, * * * tribal power does not extend beyond internal relations among members." 495 U.S. at 688. At the outset of its analysis, the Court observed that "the tribal officials do not claim jurisdiction under an affirmative congressional authorization or treaty provision," *id.* at 684—an observation consistent with the understanding that the question to be resolved in that case was one of federal common law. The Court drew principally upon its earlier decisions addressing the scope of tribal powers in civil and criminal contexts—decisions that did not themselves rest on any provision of the Constitution or suggest that Congress could not expand or contract the particular power at issue. See *id.* at 685-688.

The Court then considered, and ultimately rejected, the argument that "a review of history requires the assertion of jurisdiction" by Tribes over non-member Indians. 495 U.S. at 688. The Court recognized that Acts of Congress had, since the early nineteenth century, provided for federal criminal jurisdiction over crimes between Indians and non-Indians in Indian country, but not over "crimes committed by one Indian against the person or property of another Indian." Act of June 30, 1834, ch. 161, § 25, 4 Stat. 733; see 18 U.S.C. 1152; Act of Mar. 3, 1817, ch. 92, § 2, 3 Stat. 383. And the Court cited in that regard (495 U.S. at 689) its earlier decision in *United States* v. *Rogers*, 45 U.S. (4 How.) 567 (1846),

which observed that the exception in Section 25 of the 1834 Act for Indian-against-Indian crimes "does not speak of members of a tribe, but of the race generally,—of the family of Indians," and concluded that Section 25 was "intended to leave them both, as regarded their own tribe, and *other tribes also*, to be governed by Indian usages and customs." *Id.* at 573 (emphasis added); see *Crimes Committed by Indians*, 17 Op. Att'y Gen. 566, 570 (1883) (stating that a Tribe probably had jurisdiction to prosecute the murder of one of its members by a member of another Tribe) (cited in U.S. Br. 30-31; U.S. Br. at 13, *Duro*, *supra* (No. 88-6546).[5] The Court also discussed the Courts of Indian Offenses, which were established by the Department of the Interior in the absence of tribal courts, and which exercised jurisdiction over all Indian offenders within a reservation. 495 U.S. at 689; see 1 Op. Sol. Dep't of Interior 445, 476 (1934) (noting as one possible basis for Courts of Indian Offenses that they "derive their power from the tribe, rather than from Washington"); accord Felix Cohen, *Handbook of Federal Indian Law* 149 (1942).

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[5] The *Duro* Court did not address the opinion of the Attorney General cited in the text. Nor did the Court discuss another opinion of the Attorney General, which had been cited in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 199 (1978), in support of the proposition that a Tribe could not prosecute *non*-Indians, the reasoning of which necessarily leads to the conclusion that a Tribe *could* prosecute all Indians within its reservation unless that power had been specifically limited by Congress. See *Jurisdiction of the Courts of the Choctaw Nation*, 7 Op. Att'y Gen. 174 (1855) (reasoning that Tribes retained all powers not from them by the United States, but that the power to prosecute non-Indian citizens of the United States had been withdrawn); Felix Cohen, *Handbook of Federal Indian Law* 147-148 (1942).

The Court reasoned, however, that those statutory and regulatory provisions, being directed at "the Government's treatment of Indians as a single large class with respect to *federal* jurisdiction and programs," were "not dispositive of a question of *tribal* power to treat Indians by the same broad classification," even if they reflected "the tendency of past Indian policy to treat Indians as an undifferentiated class." *Duro*, 495 U.S. at 689-690. The Court also considered several opinions issued by the Solicitor of the Department of the Interior during the 1930s that the Court concluded were not entirely consistent as to the continued existence of an inherent tribal power to prosecute non-member Indians. *Id.* at 691-692; see Br. of Amici Eighteen American Indian Tribes 24-29 (discussing Solicitor's opinions). Nothing in the Court's discussion suggests any *constitutional* impediment to the recognition of such jurisdiction in a Tribe.

The Court did not even refer to the Constitution until the penultimate section of its opinion in *Duro*, which noted various distinctive features of tribal prosecutions, including that "the Bill of Rights does not apply to Indian tribal governments." 495 U.S. at 693. The Court concluded that those features, coupled with the absence of any congressional "delegation of authority to a tribe [that] has to date included the power to punish non-members in *tribal* court," counseled against the Court's *itself* "produc[ing] such a result through recognition of inherent tribal authority." *Id.* at 694. And, although the Court observed that "[o]ur cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right," *id.* at 693, the Court did not indicate that any such "constitutional

limitations" would prevent Congress from authorizing a Tribe to prosecute members of another Tribe notwithstanding their American citizenship. Rather, after acknowledging that the fact "[t]hat Indians are citizens does not alter the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits," *id.* at 692, the Court stated that, "[i]f the present jurisdictional scheme [resulting from its decision] proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs," *id.* at 698.

Congress's "broad authority" to legislate with respect to Indian affairs, *Duro*, 495 U.S. at 692, squarely encompasses the authority to enact the provision at issue here. Section 1301(2), as amended after *Duro*, regulates solely the relationship among Tribes as a class and the Indians affiliated with those Tribes. Just as Congress may, for example, define the attributes of Indians' membership in their own Tribe to include entitlement to services provided by the United States or by another Tribe on whose reservation they reside, see 25 U.S.C. 450j(h), or to employment preferences along with members of that Tribe, see 42 U.S.C. 2000e-2(i); *Dawavendewa* v. *Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1120-1124 (9th Cir. 1998), cert. denied, 528 U.S. 1098 (2000), Congress may define the attributes of Indians' tribal membership to include submission to the criminal jurisdiction of any other Tribe whose laws they violate. Congress's restoration of tribal criminal jurisdiction over non-member Indians provides important protections to all Tribes and all tribal members. It assures each tribal member that not only his own Tribe, but also any other

Tribe whose territory he may enter, will have the power to address threats to public order and safety that, in Congress's view, could not as effectively be addressed by either the United States or the States.

C. Respondent further asserts that amended Section 1301(2) is unconstitutional because the Indian Civil Rights Act does not specifically require every procedural protection for criminal defendants that is required by the Constitution. Resp. Br. 19-23. Respondent does not contend that any omitted protection would necessarily be implicated in every tribal prosecution of a non-member Indian. Nor does respondent attempt to justify invalidating Section 1301(2) as a facial matter merely because constitutional issues might arise in some of its applications. See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

Respondent does not dispute that Tribes are required by the Indian Civil Rights Act—and often by their own constitutions as well—to accord protections to criminal defendants that are comparable, in most respects, to those required of States by the federal Constitution. Respondent, like the Court in *Duro*, focuses solely on the Indian Civil Rights Act's omission of the right to appointed counsel. See Resp. Br. 22; *Duro*, 495 U.S. at 691. Even if the Constitution required that Tribes provide counsel whenever States must do so under the Sixth Amendment, as incorporated through the Fourteenth Amendment (but see U.S. Br. 41 n.14), many tribal prosecutions would not violate that condition. Among such prosecutions would be those in which the defendant was not indigent; or the Tribe

provided counsel, as a number of Tribes do; or the offense was not punishable by incarceration; or tribal authorities agreed to forgo incarceration in the defendant's case. See U.S. Br. 40-41. In other cases, a defendant could seek federal habeas review of a tribal conviction obtained in violation of his rights under the Indian Civil Rights Act (including its due process provision, 25 U.S.C. 1302(8)) or the Constitution.[6] Especially in view of Congress's creation of a specific mechanism to challenge allegedly impermissible exercises of tribal prosecutorial authority in individual cases, the mere fact that Section 1301(2) "might operate unconstitutionally under some conceivable set of circumstances," *Salerno*, 481 U.S. at 745, does not require its invalidation.[7]

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[6] In 1968, when the Indian Civil Rights Act was enacted, this Court had not yet held that the Sixth Amendment right to appointed counsel extends to prosecutions for offenses with a maximum term of incarceration of six months or less. See *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972) (recognizing that right when the defendant is sentenced to any imprisonment). Under 25 U.S.C. 1302(7), as originally enacted, the maximum term of incarceration that a Tribe could impose for any offense was six months. See Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. No. 99-570, Title IV, § 4217, 100 Stat. 3207-146 (increasing maximum from six months to one year to "enhance the ability of tribal governments to prevent and penalize the traffic of illegal narcotics on Indian reservations").

[7] Respondent, who proceeded without counsel in tribal court, does not contend that he asserted a federal right to appointed counsel in that forum, which would have afforded the Tribe the opportunity to consider whether to appoint counsel or to forgo an incarceration penalty. Nor did he bring a federal habeas challenge to his tribal conviction. (In a federal habeas proceeding under Section 1303, the opposing party would be the appropriate tribal official, not a federal official, as respondent mistakenly assumes. See Resp. Br. 30.).

Finally, *Reid* v. *Covert*, 354 U.S. 1 (1957), on which respondent relies (Resp. Br. 11, 22) and which *Duro* cites (495 U.S. at 693-694), does not suggest that Congress may authorize Tribes to prosecute non-member Indians only if it imposes on Tribes the identical requirements that the Constitution imposes on States. *Reid* held that Congress could not subject civilian members of military families stationed abroad to trial by court martial. No single rationale commanded a majority of the Court. Justices Frankfurter and Harlan, who separately concurred in the judgment, suggested that Congress was *not* required to afford all constitutional protections to U.S. citizens who commit crimes abroad (at least when the offense was not a capital one). See 354 U.S. at 44-45 (Frankfurter, J., concurring in result); *id.* at 75-76 (Harlan, J. concurring in result).

Here, in exercising its "broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits," *Duro*, 495 U.S. at 692, Congress is entitled to some flexibility in its imposition of Bill of Rights-type requirements, so as to accommodate the unique circumstances of Tribes and tribal members. For example, Congress could leave it to individual Tribes to decide in the first instance whether, or in what circumstances, to provide for appointment of counsel, taking into account the nature of the Tribe's judicial system, the availability of resources, and other factors. The equal protection and due process provisions of the Indian Civil Rights Act protect against discriminatory or arbitrary exercises of that authority by Tribes.[8]

[8] Although respondent raises the prospect of a non-member Indian's being prosecuted by a Tribe with "laws and mores" different from those of his own Tribe (Resp. Br. 22 n.8), such cases are unlikely to arise with any frequency. First, many tribal criminal codes closely resemble federal and state criminal codes, and many tribal courts closely resemble federal and state courts. See Br. of Amici Eighteen Indian Tribes 12-15. Respondent does not suggest, for example, that his own Tribe would view his offense of assault on a police officer any more leniently than did the Spirit Lake Nation. Second, of the non-member Indians who are tried in tribal court, many have lived or worked on the prosecuting Tribe's reservation, and consequently can be expected to be familiar with its "laws and mores." Respondent himself was married to a member of the Spirit Lake Nation and lived on its reservation. See *id.* at 4-5. Third, individuals who commit crimes while temporarily visiting the United States or a State are subject to prosecution there, even if they are unfamiliar with the particular "laws and mores" of the place of prosecution. There is consequently nothing remarkable about allowing a Tribe to prosecute members of other Tribes who come within its reservation, whether on a transient basis or on an extended basis. Finally, in the event that a defendant's unfamiliarity with the prosecuting Tribe's culture leads to a denial of equal protection or due process, federal habeas review is available.

III. RESPONDENT CANNOT JUSTIFY TREATING HIS TRIBAL PROSECUTION, IF BEYOND THE JURISDICTION OF THE TRIBE, AS A DOUBLE JEOPARDY BAR TO HIS FEDERAL PROSECUTION

Because, as previously explained, the post-*Duro* amendment to Section 1301(2) may be read only as a restoration of tribal sovereign power, respondent's tribal prosecution conducted pursuant to Section 1301(2) may be treated only as an exercise of tribal sovereign power for double jeopardy purposes. The Spirit Lake Nation necessarily acted as a sovereign separate from the United States in prosecuting respondent, because neither Section 1301(2) nor any other federal law delegates federal prosecutorial power to Tribes. Even

if the tribal prosecution is ultimately held to be invalid because it was not conducted under a constitutional restoration of tribal power, that would not provide any basis on which to recharacterize the tribal prosecution as a federal one and impose it as a double jeopardy bar to the prosecution by the United States in this case.

Respondent cannot escape that conclusion. Although respondent insists that he "was placed in jeopardy during his tribal prosecution" (Resp. Br. 25), that is beside the point, because that prosecution could only have been conducted by a sovereign separate from the United States. If, contrary to the United States' submission, Congress could not constitutionally authorize the Spirit Lake Nation to exercise criminal jurisdiction over respondent as a non-member Indian, respondent's tribal conviction would be void and he could pursue whatever relief the Tribe might provide in such circumstances. Although respondent might then view it as unfair that he served his entire tribal sentence, that is the consequence of not asserting a timely challenge to the Tribe's authority to prosecute him, which could have been raised on federal habeas under Section 1303 or through other available means. See *Morris* v. *Tanner*, No. 99-36007, 2001 WL 832722 (9th Cir. July 24, 2001) (federal constitutional challenge to Tribe's authority to prosecute non-member Indian; tribal prosecution stayed pending federal court resolution), on remand, 288 F. Supp. 2d 1133 (D. Mont. 2003) (upholding 25 U.S.C. 1301(2) against constitutional challenge). Whether or not the tribal conviction was valid, respondent may be able to seek an adjustment of his federal sentence to account for time spent in custody for an offense involving the same conduct. See 18 U.S.C. 3585(b).

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For the foregoing reasons and those stated in the United States' opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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